117 U.S. 582

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 187.

JAMES N. BURNES, PLAINTIFF IN ERROR,

vs.

WILLIAM L. SCOTT AND JOSEPH McCARTER, EXECUTORS OF MILTON COURTRIGHT, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JANUARY 20, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the record and proceedings as also in the renditoin of the judgment of a plea which is in the said circuit court, before you, at the May term, 1882, thereof, between Milton Courtright, plaintiff, and James N. Burnes, defendant, a manifest error hath happened to the great damage of the said defendant, James N. Burnes, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office in the city of Kansas with the seal of the circuit court of the United States for the western division of the western district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.]

H. C. GEESBERG,
Clerk Circuit Court United States, Western District of Missouri,
By WARREN WATSON,
Deputy Clerk.

Allowed by—

GEO. W. McCRARY, *Judge.*

1½ *Return to Writ.*

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court, at the city of Kansas, this 15th day of August, A. D. 1882.

H. C. GEISBERG, *Clerk,*
By WARREN WATSON, *D. C.*

[Endorsed:] No. 281. United States circuit court, western district of Missouri. James N. Burnes, plaintiff in error, *vs.* Milton Courtright, defendant in error. Writ of error to the circuit court of the U. S. for the west. div. of west. dist. of Missouri. Filed 27 day of May, 1882. H. C. Geesberg, clerk.

2 The United States of America to Milton Courtright, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein James N. Burnes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable ——— ———, judge of the circuit court of the United States for the western division of the western district of Missouri, this 27th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

{Seal of the United States Circuit Court, Western Division, for the Western District of Misssouri.}

GEO. W. McCRARY, *Judge.*

2½ UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

We hereby acknowledge due service of the within citation, this 27th day of May, A. D. 1882.

BOSFORD & WILLIAMS, &
GEO. W. DECAMP,
Attorneys for Defendant in Error.

[Endorsed:] United States circuit court, western division, of the western district of Missouri. James N. Burnes, plaintiff in error, *vs.* Milton Courtright, defendant in error. Citation. Filed May 27th, 1882. H. C. Geesberg, clerk.

3 UNITED STATES OF AMERICA, *sct:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in a cause wherein Milton Courtright was plaintiff and James N. Burnes was defendant.

Be it remembered that heretofore, to wit, on the 18th day of December, A. D. 1880, in vacation of said court, the following entry appears of record, to wit:

SATURDAY, *December* 18*th*, 1880.

MILTON COURTRIGHT *against* JAMES N. BURNES. } 281.

This day there is received and filed herein the following papers

in the above cause, removed by change of forum from the circuit court of the United States for the eastern division of the western district of Missouri into this court, pursuant to the act of Congress approved January 1st, 1879, entitled "An act to divide the western district of Missouri into two divisions and to prescribe the times and places for holding courts therein, and for other purposes," to wit: Petition, summons, *præcipe* for alias writ, alias summons, affidavit of deputy marshal, answer, reply, three stipulations, notice and interrogatories and stipulation, consent as to commissioner, cross-interrogatories, amended answer, motion to suppress deposition, reply and affidavit for continuance, stipulation to transfer, bill of exceptions, and other papers.

And said papers and records are in words and figures as follows, to wit:

4 *Petition.*

In the Circuit Court of the United States for the Western District of Missouri.

MILTON COURTRIGHT, a citizen of the State of Pennsylvania,
vs.
JAMES N. BURNES, a citizen of the State of Missouri.

UNITED STATES OF AMERICA, *Western District of Missouri:*

Milton Courtright, a citizen of the State of Pennsylvania, one of the United States, complains of James N. Burnes, defendant, a citizen of the State of Missouri, one of the United States.

And states that he became the contractor with the Chicago and Southwestern Railway Company on the 25th day of September, 1869, to build a railway from Washington, in the State of Iowa, to Cameron, in the State of Missouri; that in part consideration for the building and construction of said road he became entitled to receive large tracts of land in the counties of Jefferson, Davis county, Wapello county, Appanoose county, and Wayne county, in the State of Iowa; also large tracts of land in the State of Missouri, to wit, in the county of Grundy, Daviess county, Clinton county, and Buchanan county, and the complainant, Milton Courtright, received a large amount of promissory notes in part consideration for the building of said road under said contract from citizens along the line of said road from Washington, Iowa, to Cameron, Missouri, to wit, from persons in the county of Jefferson, notes and obligations for the payment of money to him to the amount in the aggregate of fifty thousand ($50,000.00) dollars; from persons
5 living along the line of said road in Daviess county, the sum of twenty-five thousand ($25,000.00) dollars; from persons living along the line of said road in Wapello county, the sum of twenty thousand ($20,000.00) dollars; and from persons living along the line of said road in Appanoose county, the sum of one hundred thousand ($100,000.00) dollars; and from persons living along the line of said road in the county of Wayne, one hundred thousand dollars ($100,000.00). And the said Milton Courtright (the

petitioner) states that he did make, constitute, and appoint James N. Burnes, by a certain instrument of writing, dated and executed on December 2nd, A. D. 1872, and acknowledged the 18th day of December, A. D. 1872, in the city of New York, his attorney-in-fact to dispose of absolutely in fee-simple or otherwise any and all tracts of land and any and all lots and blocks of land in any and all towns and cities lying and being in either of the following counties in the State of Iowa and along or near the line of the Chicago and Southwestern railroad, to wit: Washington county, Jefferson county, Daviess county, Appanoose county, or Wayne county, in the State of Iowa, and in either of the following counties in the State of Missouri, to wit: Mercer county, Grundy county, Daviess county, Platt county, and Buchanan county.

And the said petitioner saith that he did by said instrument of writing also empower said James N. Burnes and authorize him his said attorney-in-fact to demand, sue for, *receiver*, and receive any and all bonds, notes, money, or any chose in action belonging to or in which said petitioner was interested, originating from his connection as contractor of the Southwestern Railway Company, in the hands of any person or corporation within either of the counties above named.

6 And the said petitioner saith that he did empower said James N. Burnes in said instrument of writing to sign, execute, acknowledge, and deliver such deed or deeds for any part of said real estate, and such releases, receipts, or acquittances for such bonds, notes, moneys, or chose in action as his said attorney might deem fit and expedient and proper in the premises.

And this petitioner, the plaintiff, saith that the said James N. Burnes, his attorney-in-fact, did receive and accept said power of attorney and did place or cause the same to be placed on record in the counties of Washington, Jefferson, and other counties along the line of said road, and did then and there take possession in pursuance of said power of attorney, & the lands, lots, and real estate of this petitioner, and also did, in pursuance of said power of attorney, receive a large number of notes, bonds, and other choses in action for the use and benefit of this petitioner, and as this petitioner's agent and attorney-in-fact, in pursuance of said power of attorney, did then and there proceed to sell and dispose of the lands, lots, and real estate of this petitioner and executed deeds therefor.

This petitioner was named and described in said titles or deeds as trustee, and named and described by his said attorney-in-fact in the several deeds made by him for said lots and lands as trustee, and the said defendant, James N. Burnes, did receive as his said attorney-in-fact and receipt for as this petitioner's attorney the sum of three thousand two hundred and ninety-seven dollars and eighty-three cents ($3,297.83), this last-mentioned sum received from lots and lands belonging to said petitioner, situate in the town of Elden, in the county of Wapello and State of Iowa.

And this petitioner further states that on the 20th day of August, A. D. 1877, he demanded payment of said sum of three thou-

7 sand two hundred and ninety-seven dollars and eighty-three cents ($3,297.83, of and from said defendant, and that no part thereof was then or has been paid to this plaintiff. Wherefore this plaintiff prays judgment against defendant for the sum of three thousand two hundred and ninety-seven dollars and eighty-three cents ($3,297.83), with interest from the said 20th day of August, A. D. 1877.

And this plaintiff, for further cause of action, states that on or about the 17th day of August, A. D. 1874, and up and until the 15th day of March, A. D. 1876, said James N. Burnes did in pursuance of said power of attorney sell and convey to divers persons a large number of lots and lands situate in the town of Allerton, in the county of Wayne and State of Iowa, and did receive in consideration of and for this plaintiff the sum (in the aggregate) — five thousand six hundred and thirty dollars and eighty three cents ($5,630.83.) And the plaintiff states that on the 20th day August, A. D. 1877, he demanded payment of said sum of and from said defendant, his attorney-in-fact, but that no part thereof has been paid. Wherefore this plaintiff prays judgment against the defendant for the sum of five thousand six hundred and thirty dollars and eighty-three cents ($5,630.83), with interest from said 20th day of August, A. D. 1877.

And said plaintiff, for further cause of action, states that the defendant under the power of attorney aforesaid, and as the attorney-in-fact of this plaintiff, sold and conveyed a large number of certain lots of land in the town of Seymour, and State of Iowa, the property of this plaintiff, to parties to this plaintiff unknown, being the property of this plaintiff, and made deeds of conveyance for the same as the agent of this plaintiff in pursuance of the power of attorney
8 aforesaid herein referred to, and did receive the proceeds of said sales by the hand of one Dr. H. S. Rodgers, of said town of Seymour, who acted as agent for said Burnes, for whom he was acting as agent for said defendant, the sum of two thousand and eighty dollars and forty-three cents ($2,080.43). And this plaintiff says that he demanded payment from said Burnes of said sum on the 20th day of August, 1877, but that no part thereof has been paid to this plaintiff.

Wherefore this plaintiff prays judgment against the defendant for two thousand and eighty dollars and forty-three cents ($2,080.43), with interest thereon from said 20th day of August, A. D. 1877.

This plaintiff, for further cause of action, states that in pursuance of said power of attorney the said defendant, as attorney-in-fact as aforesaid of this plaintiff, did place large amount of promissory notes, the property of this plaintiff, made by divers persons for the payment of money to this plaintiff, amounting to the sum of about one hundred thousand dollars ($100,000.00), in the hands of Vermillion, Haines, and Vermillion, attorneys-at-law in the town of Centreville, county of Appanoose and State of Iowa, for collection for the benefit and use of this plaintiff. And this plaintiff says that said Vermillion, Haines, and Vermillion, as such attorneys, or some one of them, did collect and receive from the proceeds of said notes, the money of this plaintiff, the sum of thirty-five thousand two hundred

and fifty ($35,250.00), and the said Vermillion, Haines, and Vermillion did pay over and deliver to said defendant the last-mentioned sum of money at or about the days and times following, to wit:

Feb. 1, 1873.	Eighteen hundred dollars	$1,800 00
M'ch 24, 1873.	Two thousand dollars	2,000 00
June 6, 1873.	Thirteen hundred dollars	1,300 00
Sept. 8, 1873.	Twenty-four hundred dollars	2,400 00
Oct. 27, 1873.	Three thousand dollars	3,000 00
Jan'y 4, 1874.	Eighteen hundred dollars	1,800 00
Feb'y 13, 1874.	Three thousand dollars	3,000 00
April 25, 1874.	Two thousand dollars	2,000 00
June 3, 1874.	Twenty-eight hundred dollars	2,800 00
July 1, 1874.	Two thousand dollars	2,000 00
Dec. 25, 1874.	Seven thousand dollars	7,000 00
Dec. 28, 1874.	Three thousand dollars	3,000 00
M'ch 1, 1875.	Eight hundred and fifty dol's	850 00
April 2, 1875.	Twenty-three hundred dol's	2,300 00
	In all as aforesaid the sum of	$35,250 00

And this plaintiff further states that on the 20th day of August, A. D. 1877, he demanded payment of said sum of defendant, but that no part thereof has been paid to this plaintiff.

Wherefore the plaintiff prays judgment against the defendant for the sum of thirty-five thousand two hundred and fifty dollars ($35,250.00), with interest from said 20th day of August, A. D. 1877.

And this plaintiff, for a further cause of action against said defendant, states that in pursuance of and by virtue of and under the power of attorney herein mentioned, the said defendant did receive of the property of this plaintiff a large number of promissory notes, made for the payment of money to this plaintiff, from divers persons along the line of said Chicago and Southwestern railway in the county of Jefferson and State of Iowa, and that this defendant employed counsel to bring suits in the district court of Jefferson county, Iowa, in the name of this plaintiff, and did obtain judgments in favor of this plaintiff upon said notes to a large amount, and did receive of and from the proceeds of said judgments, by the hands of Acheson and Slagle and other attorneys of said district court of Jefferson county a large amount of money, to wit, from the proceeds of said collections, the sum of about fifty thousand ($50,000.00) dollars, and judgments rendered about July term, A. D. 1874.

And this plaintiff further states that he did demand payment of said sum of money, collected as aforesaid from said defendant, about the 20th day of August, A. D. 1877, but no part thereof has been paid.

Wherefore the plaintiff prays judgment against defendant for fifty thousand ($50,000.00) dollars.

And this plaintiff, for a further cause of action, states that on the

10th day of October, A. D. 1872, at the city of Chicago, Illinois, the defendant, by his promissory note of that date, herewith filed and marked Exhibit "A," did promise to pay thirty days after date to the order of F. H. Winston seven thousand three hundred and thirty-three (7,333.00) dollars, payable at the Cook County National Bank, in Chicago, value received, and then and there delivered said note to said F. H. Winston, which said note said Winston afterwards endorsed and for a valuable consideration delivered to George W. DeCamp for this plaintiff, who then became the endorsee, and now is the holder and owner thereof, and that no part of said note has been paid to this plaintiff.

Wherefore this plaintiff prays judgment against said defendant for the sum of seven thousand three hundred and thirty-three (7,333.00) dollars, the amount of said note, with interest thereon since the 10th day of November, 1872.

MILTON COURTRIGHT,
BOTSFORD & WILLIAMS,
Jefferson City, Attorneys for Plaintiff.

11 EXHIBIT "A."

7,333.00. Chicago.

CHICAGO, *October 10th*, 1872.

Thirty days after date I promise to pay to the order of F. H. Winston seven thousand three hundred and thirty-three dollars, payable at the Cook County Nat. Bank, in Chicago, value received.

Due Nov. 12th, '72.

JAMES N. BURNES.

(And endorsed on the back as follows:) Pay to the order of Geo. W. DeCamp without recourse to me. F. H. Winston. George W. DeCamp.

12 *Summons.*

WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon James N. Burnes, a citizen of the State of Missouri and the western district thereof, to be and appear before the honorable circuit court of the United States, in and for the western district of Missouri, on the first day of the next term thereof, to be begun and holden at the city of Jefferson, in said district, on the third Monday, the 15th day of April next; then and there to answer the complaint of Milton Courtright, a citizen of the State of Pennsylvania, as set forth in the petition filed in the office of the clerk of said court on the 29th day of March, A. D. one thousand eight hundred and seventy-eight.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 29th day of March, A. D. eighteen hundred and seventy-eight. Issued at office in the city of

Jefferson, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk of said Court.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *sct:*

I do hereby certify that I served the within summons by leaving a copy of the same with a copy of the petition filed in the case at the Bank of St. Joseph, city of St. Joseph, county of Buchanan.

Done this 30th day of March, 1878, in the western district of Missouri.

13 C. C. ALLEN,
U. S. Marshal, Western District of Missouri,
By JOSEPH SCHMITZ, *Deputy.*

230 miles' travel, at 6 cts.	$13 80
One service, at $2.00	$2 00
Total	$15 80

14 *Affidavit of Deputy Marshal.*

ST. JOSEPH, MO., *April* 13, '78.

I do hereby certify that I served the writ and petition in the suit of Milton Courtright *vs.* James N. Burnes at the office of James N. Burnes, at the Bank of St. Joseph, on the 30th day of March, A. D. 1873, in the city of St. Joseph, Mo.; being informed by George Hall, cashier of said bank, and also *of* J. C. Anderson, one of the employees in said bank, that James N. Burnes was absent from the city and State.

And I further state that C. C. Burnes, brother of James N. Burnes, informed me, a few hours afterwards, that he had handed the writ and petition to his brother, James N. Burnes.

JOSEPH SCHMITZ,
Deputy U. S. Marsh., W. D. Mo.

STATE OF MISSOURI, *County of Buchanan:*

Subscribed and sworn to before me, this 13th day of April, A. D. 1878.

JOHN C. BENCH,
Notary Public.

Commissioner May 13th, 1875; qualified May 20th, 1875; expires May 13, 1881.

15 *Alias Summons.*

WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon James N. Burnes, a citi-

zen of the State of Missouri and the western district thereof, to be and appear before the honorable circuit court of the United States, in and for the western district of Missouri, on the first day of the next term thereof, to be begun and holden at the city of Jefferson, in said district, on the third Monday, the 18th day of November next; then and there to answer the complaint of Milton Courtright, a citizen of the State of Pennsylvania, as set forth in the petition filed in the office of the clerk of said court on the 29th day of March, A. D. one thousand eight hundred and seventy-eight.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 15th day of April, A. D. eighteen hundred and seventy-eight. Issued at office, in the city of Jefferson, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk of said Court.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *sct:*

I do hereby certify that I served the within writ by leaving a true copy of the same, together with a true copy of the petition filed in the case, with James N. Burnes in person, in Jefferson City, Mo., April 15, 1878.

C. C. ALLEN,
U. S. Marshal, Western District of Missouri.

16 *Answer.*

In the Circuit Court of the United States for the Western District of Missouri. November Term, 1878.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

The defendant, for answer to the plaintiff's petition, denies each and every material allegation of each and every count thereof.

And for a further answer the defendant says that, before the bringing of this suit, he fully paid off and discharged all the demands and claims set up in said petition to the plaintiff.

And for a further answer the defendant says that, before the bringing of this suit, and after the time the plaintiff pretends that the causes of action in his petition set out accrued, the defendant paid plaintiff a large amount of money, to wit, —— thousand dollars, for and in full satisfaction and discharge of said pretended demands in said petition mentioned, and which said sum the plaintiff then accepted and received of and from defendant in full satisfaction and discharge of said demands.

W. P. HALL, WATERS & WINSLOW,
For Defendant.

17 *Reply.*

In the Circuit Court of the United States, Western Dist. Mo.

MILTON COURTRIGHT, the Plaintiff, *vs.* JAMES N. BURNES, the Def't.

Plaintiff, for reply to the new matter set up in answer of defendant herein, in the second count thereof, denies each and every allegation therein.

And, for reply to the new matter set up in said answer, in the third count thereof, denies each and every allegation therein.

BOTSFORD & WILLIAMS,
For Plaintiff.

18 *Amended Answer.*

The United States Circuit Court, in the Eastern Division of the Western District of Missouri.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } No. 1078.

Defendant, for amended answer to the first count of plaintiff's petition, denies each and every allegation in said — contained.

And, for a further answer to said count, defendant says that before the bringing of this suit, to wit, in August, 1877, defendant paid plaintiff a large amount of money, bonds, and lands in full satisfaction and discharge of the claim in said first count mentioned, & plaintiff & defendant then had a full settlement of all said claims, and plaintiff then received said money, bonds, and lands in full accord, satisfaction, and discharge of said claim.

And for amended answer to the second count of said petition defendant says that before and at the time of making the note in said second count described plaintiff, this defendant's trustee, F. H. Winston, and George C. Campbell had been and were partners in a contract to build to the city of Atchison, Kansas, the Atchison Branch of the Chicago and Southwestern railroad, and said Winston had been in charge of the construction of the branch railroad for said partners under said contract, and had in his possession forty thousand dollars of the bonds of said city of Atchison belonging to said partners subject to the payment of partnership debts & the settlement of said partnership. Shortly before said notes were made said partners made, instituted, and appointed the defendant as trustee for said partners to take charge of said partnership business in place of said Winston and to wind up said business. At the time of making
19 said notes, said partnership had not been settled, nor is it settled yet. Said Winston, at the time of making of said note, turned over to this defendant said bonds and other assets in his hands belonging to said partners, as trustee of said partners, and with the consent of said partners, and for the benefit of said partnership. At the time said Winston turned over to the defendant said bonds and assets said Winston estimated that there would be due him, as a partner as aforesaid, upon the final settlement of said partnership

business, a considerable sum of money arising from said bonds or their proceeds, and he estimated that sum at the amount of the note; but, there having been no settlement of said business, said Winston and the defendant considered said estimate as a matter of conjecture, dependent upon the debts due from said partnership and the result of said settlement. Said Winston, therefore, requested this defendant, as the trustee of said partners—of whom plaintiff was one—to make said note, with the understanding that it was not to be sued on, and that the same was a mere memorandum of the amount that said Winston considered as his probable interest in said bonds as a partner as aforesaid. Defendant executed said note with the understanding aforesaid by and between Winston & the defendant, and as Winston, of said partners & note, as his separate note; & said note so executed was executed with the approval of said partners, including plaintiff, for the purpose aforesaid. Said Winston signed said note for the benefit of plaintiff without any consideration paid him by plaintiff, or any consideration whatever, with full knowledge on part of plaintiff of said facts relating to said notes, & after the time said note became due on its face, and under the agreement between Winston & plaintiff that said note should not be sued upon; and this defendant says that said note was and is wholly without consideration, & is, as to the defendant, null and void.

And for a further answer to said second count defendant says said note is based upon and given out of transactions relating to the business of said partnership, & that said partners are interested in the same, and that said partners are necessary parties to a suit relating to said note, & the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership business.

HALL, STRINGFELLOW, AND OTHERS,
For Defendant.

Affidavit for Continuance.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

In the case of MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

James N. Burnes, the above-named defendant, being sworn, says: That he cannot safely go into the trial of the above-entitled cause at this term of this court, because of the absence of George C. Campbell and Otis P. Glover, who are material witnesses for this defendant, and without whose testimony this defendant cannot safely go into the trial of said cause. That said witnesses both reside in the city of Chicago, in the State of Illinois. That said witnesses have not been subpœnaed nor their depositions taken in the above-entitled cause, because this affiant did not know of the testimony of said witnesses, nor of either of them, until on the eighteenth day of this present month, and so since said information just came to his knowledge, this affiant has not been able to procure the testimony of said witnesses, or of either of them. This affiant

says he believes he can, and expects to, prove by the testimony of said witnesses, and of each of them, that the note sued on in this petition in the above-entitled cause was without any consideration; that at the time said note was given it was agreed between this affiant, the maker, and F. H. Winston, the payee of said note, that said note was given to and to be held by said Winston as a mere memorandum of the share or interest of said Winston in certain bonds of the city of Atchison, then surrendered by said Winston to this affiant in trust and with other property on a like
22 trust. That such bonds and other property had been held by said Winston as trustee for himself, this affiant, said Campbell & others, said Winston, Campbell & others and this affiant being each and all entitled to an undivided interest in said bonds and other property, such interest being at the time said note was executed and said bonds and other property delivered by said Winston to this affiant unknown, and only to be ascertained by a settlement between the plaintiff, this affiant, said Winston, Campbell, and others; that such interest in said bonds and other property was by and under contracts for the construction of the Chicago and Southwestern railway, and the Atchison Branch of the said railway, in which contracts said plaintiff, this affiant, said Campbell, and others were interested, and that said bonds and other property transferred by said Winston to this affiant were of the assets received by said Winston as trustee for himself and the other parties above mentioned under said contracts; that the interest of said Winston and of the other parties above named was not in said bonds, nor in any of the other of said property distinct or ascertained at the time said note was given, but was dependent on a settlement between said parties after all claims against said property had been satisfied and the credits and debts of each of said parties ascertained; that no such settlement had been made at the time said note was given, nor has any such settlement since been made. That at the time such note was given it was expressly agreed between said Winston and affiant that said note was only to be held by said Winston as a memorandum to show what was estimated as the share on account of such bonds which said Winston would be entitled to claim on such settlement whenever the same might be made, and was not to be collected until such settlement should be made and the amount coming to said Winston ascertained.

23 This affiant further says that he has, since the commencement of this suit, tried to ascertain from said Campbell what he knew touching the execution of said note, but was unable to learn from said Campbell any fact within his knowledge relating thereto, and not until as above stated did this affiant ascertain what facts in relation to the execution of said note were known to and would be testified to by said Campbell. That this affiant believes he can, and expects to, obtain the testimony of said Campbell & Glover by the next term of this court, if a continuance of said cause be granted. That said witnesses are not, nor is either of them, absent by the connivance or consent of this affiant, nor is this application made for vexation or delay, but that a fair trial may be had.

That affiant does not know of any other person by whom he can prove the same facts which, as above stated, he expects to prove by said witnesses. Affiant further states that he has been in attendance upon the present term of the U. S. circuit court since last Thursday, expecting to be present at the trial of this cause if tried at this term. That he has been unwell since Sunday, and is now suffering, as he is informed by his physician, from intermittent fever and congestion of the bowels, and is now confined to his bed at the Madison House in this city. He is informed by his said physician that he cannot in his present condition safely attend the trial of this cause. That affiant is informed by his att'ys, and believes, that his presence is necessary at the trial of said cause, in order that his case may be fully presented and investigated.

JAMES N. BURNES.

Subscribed and sworn to before me, this 23rd day of November, A. D. 1880.

J. E. WATERS,

24 *Com. U. S. Circuit Court for Western Dist. Mo.*

MADISON HOTEL, CORNER MADISON AND MAIN STS.,
J. B. Kaiser, Proprietor,
JEFFERSON CITY, Mo., *Nov.* 23, 1880.

This is to certify that I have called to see James N. Burnes, Esqr. (professionally), and find that he is suffering from remittent fever, with congestion of the bowels, and confined to his bed from the above causes. My opinion is that his physical condition is such that he cannot safely leave his room to attend to business. I am a physician practicing in the city of Jefferson, Mo.

J. D. MOORE, M. D.

Subscribed and sworn to before me, this 23rd day of November, A. D. 1880.

J. E. WATERS,
Com. U. S. Cir. C't West. Dist. Mo.

25 *Stipulation to Transfer.*

In the United States Circuit Court for the Western District of Missouri, Eastern Division.

MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant. } No. 1078. At Law.

It is hereby stipulated and agreed that this cause may be changed and transferred to the western division of said district for trial at Kansas City, Mo.

BOTSFORD & WILLIAMS &
GEO. W. DECAMP,
For Plaintiff.
WILLARD P. HALL, B. F. STRINGFELLOW,
WATERS & WOODSON,
For Defendant.

26 *Bill of Exceptions.*

U. S. Circuit Court. November Term, 1880.

MILTON COURTRIGHT, Pl'ff, *vs.* JAMES N. BURNES, Def't.

On the 23rd day of November, 1880, and during the sitting of the said circuit court at the November term, the defendant filed in said court a petition praying among other things that this suit be enjoined, which petition so filed is in words and figures, as follows:

(The clerk will please copy the petition filed by James N. Burnes against Milton Courtwright as above mentioned.)

The court, after being advised in the premises, overruled the motion of said Burnes for said injunction, and refused to enjoin and stay the further prosecution of this suit; to which ruling of the court in refusing to enjoin said case said James N. Burnes, by his attorneys, at the time excepted and still excepts, and prays that this his bill of exceptions be signed and sealed, and that the matters and things therein stated be made a part of the record of this case.

A. KREKEL, *Judge.* [SEAL.]

27 MILTON COURTRIGHT *vs.* JAMES N. BURNES. } 1028.

Transcript of the orders of court and the record entries in the above-entitled cause in the eastern division of the western district of Missouri.

April Term, A. D. 1878.

MILTON COURTRIGHT *vs.* JAMES N. BURNES. } 1078.

This day comes the defendant, by Louis H. Waters, Esq., and upon motion it is ordered that the marshal have leave to amend his return on the original writ in the above cause so that the same will conform with the facts concerning the service of the same upon the defendant.

November Term, A. D. 1878.

MONDAY, *November 18th, A. D.* 1878.

MILTON COURTRIGHT *vs.* JAMES N. BURNES. } 1078.

This day comes the defendant, by W. P. Hall, Esq., and Messrs. Waters & Winslow, his attorneys, and files answer herein.

TUESDAY, *November* 19*th*, 1878.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day comes the plaintiff, by his attorneys, Messrs. Botsford & Williams, and files reply to the answer; and by consent of parties this cause is continued till next term.

28 FRIDAY, *November* 22*d*, 1878.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day come the parties, by their attorneys, the plaintiff by James S. Botsford, Esq., and the defendant by C. A. Winslow, Esq., and thereupon the continuance herein is set aside by consent, and defendant, by leave of court, has 40 days to file amended answer, and plaintiff takes leave to file reply.

TUESDAY, *December* 3*d*, 1878.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

It is ordered that the order of 22d November be set aside, and this case is again continued.

April Term, A. D. 1879.

SATURDAY, *April* 26*th*, 1879.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

In accordance with a stipulation signed by counsel it is ordered that this case be continued until the next term of this court.

November Term, A. D. 1879.

WEDNESDAY, *November* 19*th*, 1879.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

Ordered, that this cause be continued until the next term of court.

THURSDAY, *November* 20*th*, 1879.

29 MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day comes the defendant, by W. P. Hall, Esq., his attorney,

and files a stipulation, signed by counsel, in reference to filing additional pleadings by both parties and extending the time for taking testimony herein. Thereupon, in accordance with said stipulation, it is ordered that this case be continued.

In Vacation.

MONDAY, *March* 15*th*, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day there is received and filed herein a stipulation signed by counsel extending the time in which to take depositions to the first day of the next term of this court, and if further time is desired the same shall be extend*ing* twenty days more.

April Term, A. D. 1880.

TUESDAY, *April* 20*th*, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

By consent of parties it is ordered that this cause be continued until the next term of court.

WEDNESDAY, *April* 21, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day comes George W. DeCamp, Esq., and files his entry of appearance as attorney of record for the plaintiff in this cause.

30 SATURDAY, *April* 24, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day comes the defendant, by Willard P. Hall, Esq., and files a stipulation waiving all exceptions and objections as to competency or relevancy of interrogatories or cross-interrogatories in any deposition in said case.

Memo.—This entry made *nunc pro tunc* as of April 28th, 1880.

WEDNESDAY, *April* 28*th*, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day comes the defendant, by Willard P. Hall, Esq., his attorney, and moves the court to appoint a special commissioner to

take the deposition of Frederick H. Winston, of Chicago, Illinois, upon interrogatories heretofore filed, and cross-interrogatories to be filed, on or before May 5th, 1880; on consideration whereof it is ordered that said motion be sustained, and that William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, residing at Chicago, be, and he is hereby, appointed a special commissioner to take the deposition of Frederick H. Winston, and it is ordered that a commission issue accordingly.

At Chambers. Before the Hon. A. Krekel, Judge.

TUESDAY, *May 4th*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

It is ordered by the honorable Arnold Krekel, judge, at
31 chambers, that the order appointing William H. Bradley, Esq., clerk of the circuit court of the United States for the northern district of Illinois, a special commissioner to take the deposition of Frederick H. Winston, of Chicago, be set aside and for nought held. It is further ordered that Philip H. Hoyne, Esq., of Chicago, be, and he is hereby, appointed a special commissioner to take said deposition, and that a commission be issued accordingly.

In Vacation.

THURSDAY, *September 9th*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

This day there is received by mail and filed herein defendant's amended answer to plaintiff's petition.

November Term, A. D. 1880.

FRIDAY, *November 19th*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

This day comes the defendant, by Willard P. Hall, Esq., and files motion to suppress the last deposition of Frederick H. Winston, taken at Chicago, Illinois, the last of the present year.

MONDAY, *November 22d*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

This day comes the plaintiff, by Mess. Botsford & Williams and Geo. W. DeCamp, and the defendant, by Messrs. W. P. Hall, B. F.

Stringfellow, and Louis H. Waters; thereupon the motion to
32 suppress the deposition of Frederick H. Winston, heretofore filed, is argued by counsel and submitted to the court.

TUESDAY, *November* 23*d*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

This day come the parties, by their attorneys—the plaintiff, by Messrs. Botsford and Williams and Geo. W. DeCamp, and the defendant, by Messrs. Willard P. Hall, B. F. Stringfellow, and L. H. Waters—and the motion to suppress the deposition of Frederick H. Winston having been submitted to the court, on consideration whereof it is ordered that the same be overruled; to which ruling the defendant excepts. Thereupon plaintiff files reply to defendant's answer. On further motion of plaintiff, it is ordered that all counts in plaintiff's petition be dismissed except the one on the note. Thereupon defendant files an application for continuance herein, which is argued by counsel and submitted.

WEDNESDAY, *November* 24*th*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

This day comes the plaintiff, by Messrs. Botsford and Williams and Geo. W. DeCamp, and the defendant, by Messrs. Willard P. Hall, B. F. Stringfellow, and Louis H. Waters, and the application for continuance having been submitted to the court, on consideration whereof it is ordered that the same be sustained.

WEDNESDAY, *November* 24*th*, 1880.

MILTON COURTRIGHT
vs. } 1078.
JAMES N. BURNES.

33 On motion and in accordance with a stipulation this day filed, consenting thereto, it is ordered that this cause be transferred to the circuit court of the United States for the western division of the western district of Missouri, under and pursuant to the provisions of the 5th section of an act of Congress dividing the western district of Missouri, approved January 21, 1879, and the clerk is directed to make out a certified transcript of the record entries in this cause and transmit the same, together with all the original papers, to the clerk's office of our said circuit court at Kansas City, Missouri.

THURSDAY, *December 2d*, 1880.

MILTON COURTRIGHT
vs.
JAMES N. BURNES. } 1078.

This day there is presented to the court a bill of exceptions in the above-entitled cause, which is signed, sealed, and ordered to be made part of the record herein.

UNITED STATES OF AMERICA,
Western District of Missouri, Eastern Division, } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the orders of court and record entries as fully as the same remain of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Jefferson, in said
34 district, this seventh day of December, A. D. 1880.

[SEAL.] H. C. GEISBERG, *Clerk.*

35 And afterwards, to wit, at the regular May term, A. D. 1881, of said court, and on the 16th day of May, the following entry appears of record, to wit:

MILTON COURTRIGHT
against
JAMES N. BURNES. } 281.

This day comes defendant, by his attorneys, W. P. Hall and L. H. Waters, and files motion to produce certain papers duly served upon complainant's counsel.

Said motion is as follows, to wit:

36 Western Division of the Western District of Missouri, S. Ct.

MILTON COURTRIGHT *vs.* JAMES N. BURNES.

To the honorable judges of the circuit court in and for the western division of the western district of Missouri:

Your petitioner, James N. Burnes, who is defendant in the above-entitled cause now pending in this honorable court, would respectfully represent and show to your honors that there is now in the possession and under the control of the complainant, Milton Courtright, an instrument of writing made and executed by and between the said Milton Courtright and George W. DeCamp, the attorney of the complainant in this cause, by the terms of which said instrument of writing the said George W. DeCamp agrees and binds himself to prosecute this suit against your petitioner, and to pay all costs that may accrue therein, including all attorney's fees, for forty per cent. of all and any amount he may recover from your petitioner

in this cause, which writing is referred to in complainant's deposition taken in July, 1880, in New York, and filed in the suit aforesaid; and the complainant has refused to file said contracts as a part of his testimony or a copy of the same, although heretofore requested so to do.

Your petitioner further states that there is another instrument of writing made and executed by the parties aforesaid before the foregoing instrument of writing was executed, by which the said George W. DeCamp agreed to prosecute all suits and make all collections from defendant growing out of the building of the Eastern Division of the Chicago & Southwestern railway and the Atchison Branch thereof, and for his services aforesaid he was to have seven
37 twenty-fourths of any and all amounts he might recover from your petitioner, which is also referred to in complainant's deposition aforesaid. And complainant refuses to file said contract or a copy of the same as a part of his testimony in this cause, although he has been heretofore requested so to do.

Now, therefore, inasmuch as your petitioner has been advised and believes that said written contracts or a copy of the same are important and material in order to successfully defend this cause, and to show the court the true status of the parties hereto, that said contracts should be made a part of the record and brought into the court, he therefore prays that an order on the said Milton Courtright to bring the aforesaid contracts into this court on or before the trial of this cause, and your petitioner, as in duty bound, will ever pray.

J. N. BURNES,
By STRINGFELLOW, HALL & WATERS,
His Sol's.

MILTON COURTRIGHT, Esq., or
BOTSFORD & WILLIAMS, Esqs.,
His Solicitors.

You are notified that the foregoing petition will be presented to the U. S. circuit court for western division of the western district of Mo., on the first day of the May term thereof, 1881, and that defendant will move for a rule of court in pursuance thereof.

Kansas City, Mo., May 2nd, 1881.

B. F. STRINGFELLOW,
W. P. HALL &
L. H. WATERS,
Sol's for Def't.

38 Received a copy of the above notice this 2nd day of May, 1881.

BOTSFORD & WILLIAMS,
Sol's for Complainant.

39 And afterwards, at said term and on the 17th day of May, the following further proceedings appear of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day comes defendant, by his attorneys, and files motion herein to dismiss this cause.

Said motion is as follows, to wit:

40 In the United States Circuit Court for the Western Division of the Western District of Missouri.

MILTON COURTRIGHT, Plaintiff,
against } No. 281.
JAMES N. BURNES, Defendant.

And now comes the defendant in the above-entitled cause and moves the court to dismiss the same, because the plaintiff admits and testifies in his depositions taken and filed by the plaintiff therein that this suit was instituted & is prosecuted under a contract between the plaintiff and his attorney, George W. DeCamp, under and in which it was expressly stipulated and agreed that the said attorney was to prosecute said suit, and for his services in bringing and prosecuting the same he was to receive a certain part of whatever sum was or might be recovered therein, and in which it was further agreed and stipulated that said attorney was to pay all expenses & costs incurred in said suit, & because said contract is champertous & illegal, & the prosecution of this suit under said contract is against public policy & the law.

HALL, STRINGFELLOW,
WATERS, AND WOODSON,
Counsel for Defendant.

41 UNITED STATES OF AMERICA:

Circuit Court of the United States, Western Division of the Western District of Missouri.

MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant.

Now comes the defendant in the above-entitled cause, and moves the court to dismiss the same, because it is patent, from the statement of the plaintiff in his deposition on file in this case, that it was instituted and prosecuted under a champertous contract between plaintiff and George W. DeCamp, his attorney, under and by virtue of which said defendant was to prosecute this suit and defray all the expenses thereof, & receive a part of the sum recovered therein for his services as an attorney for plaintiff.

STRINGFELLOW, WATERS & WOODSON,
Solicitors for Defendant.

42 And afterwards, at said term and on the 18th day of May, the following further proceedings appear of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day comes plaintiff, by his attorneys, and files answer to motion to dismiss cause; thereupon defendant — and moves the court for leave to file an amended answer, and said motion is duly submitted.

Which said answer to motion is as follows, to wit:

43 In the Circuit Court of the United States for the Western District of Missouri.

MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant.

Now comes the plaintiff, Milton Courtright, by G. W. DeCamp, of counsel for said Courtright, and in answer to the motion of the defendant filed in this cause the 17th day of May, 1881, to dismiss the said cause for the reasons stated in said motion, and respectfully represents that the alleged facts as set forth in said motion are not true.

1. It is not true that the said plaintiff in this case had an agreement in writing or any agreement that the said George W. DeCamp should for a certain interest in said cause institute said suit and pay costs and expenses, or any costs or expenses as set out in said motion for dismissal.

2. It is not true as set out in said motion that the said plaintiff admits and testifies in his depositions that this suit was instituted and is presented under a contract between the plaintiff and his attorney, George W. DeCamp, under and in which it was expressly stipulated and agreed that the said attorney was to prosecute said suit, and for his services in bringing and prosecuting the same he was to have a certain part of whatever sum was or might be recovered therein, and in which it was further agreed and stipulated that said attorney was to pay all expenses and costs incurred in said suit.

3. It is not true that said DeCamp instituted said suit, but the fact is that the attorneys who brought this suit, Botsford & Williams, attorneys-at-law of this court, were employed by said plaintiff on his own behalf, and were and are to be paid for their services
44 by the complainant himself and not by said DeCamp in whole or in part.

4. The fact is that no other counsel were upon the record or responsible for the conduct of this case but said Botsford & Williams until long after the case was at issue.

5. That the said George W. DeCamp was not at the time of the institution of this suit an attorney-at-law of this court or of the

State of Missouri until nearly two years after the institution of this suit.

6. It is not true that said George W. DeCamp made any illegal bargain or any bargain at all, or agreement either in writing or otherwise, to institute this suit for the complainant or any other suit, or maintain any suit or suits for this complainant on the terms spoken of in said motion or any other terms, nor is it true that the said complainant so testified in the deposition referred to or any other deposition.

7. And the complainant respectfully saith that the defendant has not verified his motion and the facts in said motion stated by affidavit of his belief in their truth, and for this the said complainant ought not to be called on to answer said motion.

G. W. DECAMP,
Of Counsel for Pl'ff.

We join in the foregoing answer.

BOTSFORD & WILLIAMS,
Plaintiff's Attorneys.

45 And afterwards on the same day the following further proceedings appear of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day again come the parties, by their attorneys, and the motion for leave to file an amended answer having been submitted, it is ordered that it be sustained and said answer filed subject to such conditions as to trial or continuance as may be imposed by the plaintiff, and said answer is accordingly filed.

Said amended answer is as follows, to wit:

46 In the United States Circuit Court for the Western Division of the Western District of Missouri.

MILTON COURTRIGHT, Plaintiff, *vs.* JAMES N. BURNES, Defendant.

Defendant, James N. Burnes, by his attorney, for amended answer to plaintiff's petition says:

1st. He denies each and every allegation in said petition.

2d. For further answer to said petition says that before and at the time of making of the pretended note in said petition described, said plaintiff, this defendant, and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the city of Atchison, in Kansas, from a point on the Chicago and Southwestern railroad, which road was known as the Atchison Branch of the Chicago and Southwestern railroad. Prior to the date of said pretended note, said Winston had been in charge of the construction of said branch road for said partners under said contract, and had received and then had in his possession, as part of the assets under such contract, forty bonds of the city of Atchison for the sum of one thousand dollars each, belonging

to said partners, subject to the payment of the partnership debts, and a distribution among said partners after such payment, in proportion to their respective interests therein.

Shortly before said pretended note was made, said partners made, constituted, and appointed the defendant as trustee for said partners to take charge of said partnership business in place of said Winston, and to wind up said business. That at the time of making said pretended note said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partner-
47 ship or in said bonds been ascertained. That at the time of making said pretended note, said Winston turned over to this defendant, as trustee of said partners as aforesaid, said bonds and other assets in his hands belonging to said partnership with the consent of said partners, and for the benefit of said partnership; that at the time said Winston turned over to defendant said bonds and assets said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business, said Winston and this defendant considered said estimate as a mere conjecture depending upon the debts due by said partnership, and the result of said settlement; said Winston therefore requested this defendant, as the trustee of said partners, of whom plaintiff was one, to make said note with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account of said bonds on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself as trustee of said partnership, and not as the separate note of this defendant. Said pretended note so executed was assigned by said Winston for the benefit of plaintiff to one G. W. DeCamp, and by said DeCamp to plaintiff, without any consideration from said DeCamp to Winston, nor from said plaintiff to DeCamp, and with full knowledge by said DeCamp and plaintiff of said facts relating to said note, and that such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said DeCamp and
48 plaintiff and Winston that this defendant should not be sued upon said note.

And this defendant says that said note was and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners are interested in the same, and are necessary parties to a suit relating to said note, and the amount due upon said note if any, cannot be ascertained until a final settlement of said partnership can be had.

For further answer to said petition, said defendant says said plaintiff ought not to have or maintain his said action, because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and George W. DeCamp, his attorney,

by which said DeCamp agrees to prosecute such suit, and to pay all the expenses incident to the prosecution of the same, in consideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit, four-tenths of the amount so recovered. Which said agreement is illegal, against public policy and good morals.

Defendant therefore asks to be discharged, with his costs.

HALL, STRINGFELLOW AND WATERS,
For Def't.

49 In the U. S. District Court for the Eastern Division of the Western District of Missouri.

MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant.

And now comes the plaintiff and for replication to the new matter contained in the amended answer filed herein September 9, 1880, by said defendant, said plaintiff denies generally each and every allegation of said new matter in said amended answer contained.

BOTSFORD & WILLIAMS,
For the Plaintiff.

50 And afterwards, at said term and on the 19th day of May, the following entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day comes the plaintiff, by his attorneys, and files reply to second amended answer.

Said reply is as follows, to wit:

51 *Reply.*

In the United States Circuit Court, Western District of Missouri, Western Division.

MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant.

Plaintiff, for reply to the 2nd amended answer of defendant herein, and to each and every count thereof, denies each and every allegation in said answer, and in each and every count thereof.

BOTSFORD & WILLIAMS, &
GEO. W. DECAMP,
Attorneys for Plaintiff.

52 And afterwards, to wit, at the October term, A. D. 1881, of

said court, and on the 2nd day of November, the following entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day come the parties, by their attorneys, the plaintiff by George W. DeCamp and James S. Botsford, and the defendant by B. F. Stringfellow and Silas C. Woodson, and file a stipulation waiving a jury herein, and this cause being regularly called for trial the hearing is proceeded with, and, after production of testimony, the hearing not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

Said stipulation waiving a jury is as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri:

In the Circuit Court of the United States for said Division and District.

MILTON COURTRIGHT *against* JAMES N. BURNES.

The parties hereto hereby waive a jury trial in the above case and agree that the issues may be tried by the court before Justice McCrary.

Nov. 2, 1881.

G. W. DECAMP,
Of Counsel for Pl'ff.
STRINGFELLOW AND OTHERS,
Attorneys for Defendant.

53 And afterwards, at said term and on the 3d day of November, the following further entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day again come the parties, by their attorneys, and thereupon further proceedings are had, and, the hearing not being completed at the hour of adjournment, further hearing is postponed until to-morrow.

And afterwards, at said term and on the 4th day of November, the following further entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day again come the parties, by their attorneys, [and] thereupon further proceedings are had and this cause is submitted to the court and taken under advisement.

And afterwards, at said term and on the 9th day of January, A. D. 1882, the following further entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day come the parties, by their attorneys, and, the cause having been heretofore submitted to the court upon the pleadings and proofs and taken under advisement, now, the court having duly considered the premises and being fully advised concerning the same, doth find that the defendant is indebted to the plaintiff by reason of the matters alleged in the petition in the sum of
54 eleven thousand four hundred and one dollars and sixty cents (11,401.60). It is therefore considered by the court that the plaintiff, Milton Courtright, recover against the defendant, James N. Burnes, the said sum of eleven thousand four hundred and one dollars and sixty cents (11,401.60), so found to be due, with his costs, and have thereof execution.

Thereupon comes defendant, by his attorney, and files motion for new trial, and by consent has leave till next term to prepare bill of exceptions.

Said motion for new trial is as follows, to wit:

55 In the United States Circuit Court for the Western Division of the Western District of Missouri. Of the October Term, A. D. 1881.

MILTON COURTRIGHT *vs.* JAMES N. BURNES.

Now comes the said defendant, by his attorney, and moves the court to grant a new trial in the above-entitled cause, for the following reasons:

First. Because the court on the trial of said cause erred in excluding legal and competent testimony offered by defendant.

Second. Because the court erred on the trial of the cause in excluding and rejecting the deposition of Henry M. Aller offered to be read in evidence by the defendant.

Third. Because the court on the trial of the cause erred in excluding and rejecting books of account offered in evidence by defendant.

Fourth. Because the finding of the court is against the weight of the testimony.

Fifth. Because the finding of the court is against the law.

Sixth. Because the court erred in refusing to declare the law as asked by defendant.

Seventh. Because the court erred in declaring the law as held by the court.

STRINGFELLOW, WATERS & WOODSON,
Att'ys for Def't.

56 And afterwards, to wit, at the regular May term, A. D.

1882, of said court, and on the 27th day of May, the following entry appears of record, to wit:

MILTON COURTRIGHT
against } 281.
JAMES N. BURNES.

This day come the parties, by their attorneys, and the motion for a new trial herein having been submitted to the court, it is now ordered that the same be denied. Thereupon comes defendant, by his attorneys, and presents to the court a bill of exceptions, and also excepts to the ruling of the court in denying the motion for new trial; thereupon said bill of exceptions is signed by the circuit judge and ordered to be filed and made a part of the record herein, which is accordingly done.

And the said defendant also presents writ of error to reverse the judgment and order of this court as rendered in favor of plaintiff, which is duly signed by the circuit judge, and a citation is also signed and directed to issue upon the filing and approval by one of the judges of this court of a bond in the sum of fifteen thousand dollars, conditional that the said defendant will prosecute his writ as required by law.

Said bill of exceptions is as follows, to wit:

57 In the United States Circuit Court for the Western Division of the Western District of Missouri. Of the May Term, 1882.

MILTON COURTRIGHT, Pl'ff, *vs.* JAMES N. BURNES, Def't.

Be it remembered that on the trial of this cause the defendant offered in evidence a copy of the books of Milton Courtright and of the Atchison Branch of the Chicago & Southwestern R. R. Co., kept under the supervision of F. H. Winston as president of the C. & S. W. R. R., and trustee for the contractors of the Atchison Branch, and to read therefrom accounts showing the amount paid to said Winston and pl'f on account of the construction of the Atchison Branch, for the purpose of showing that at the date of the note sued on said Winston & pl'ff had been paid more than their share of the profits arising from said contract.

In connection therewith defendant introduced testimony showing that the original books were the books of Milton Courtright pertaining to the construction of the C. & S. W. R. R. Co. and the trustee of Milton Courtright.

That the original of these books are in the possession of the Chicago, R. I. & P. R. R. Co. at Chicago, successors of C. & S. W. R. R. That they were turned over to that Co. in 1872 by Winston, and that they are part of the records of that corporation.

To the introduction of the copies of said books pl'ff objected, because no effort has been made to obtain the original books, & in their absence the best evidence would be the testimony of the bookkeeper who made the originals.

58 The court sustained the objection and refused to allow def't to introduce the said copies of said books, and because they were irrelevant and immaterial.

The defendant then gave evidence tending to show that Winston, the payee and assignor of the note sued on, the plaintiff, defendant, and one Campbell were the contractors for the construction of the Chicago and Southwestern railroad as partners, and that Winston was entitled to an interest of $(\frac{2}{15})$ two-fifteenths in such contract.

That the road was constructed in 1871. That Winston had charge of the execution of such contract and possession and control of the assets arising from such contract. That after the completion of said road, in October, 1872, Winston delivered to defendant forty bonds of the city of Atchison for one thousand dollars each, which had been received and were then held by him as part of the assets under such contract. That such bonds were delivered by Winston to and received by defendant as the trustee for the parties in interest in such contract.

That at the time these bonds were so delivered defendant gave to Winston the note sued on.

Plaintiff gave evidence tending to contradict the foregoing evidence offered by defendant.

Defendant then offered Burnes as a witness, and offered to show by his testimony that the note sued on when given was not intended by him, the maker, nor by Winston, the payee, as a promissory note, but was only intended and so given by him and received by Winston as a memorandum of the then estimate of the value of the estimated interest*ed* of Winston in the Atchison bonds then delivered as part of the profits of the aforesaid contract for the construction of the Atchison Branch to be accounted for on a settlement between the partners to such contract.

59 To the giving of such evidence plaintiff objected, as irrelevant and incompetent; and the court having received the evidence subject to the objections on final consideration, the objections were sustained by the court, and the evidence rejected.

To which opinion of the court in excluding such evidence defendant at the time excepted.

The plaintiffs gave evidence tending to contradict that of the defendant above stated. Defendant then gave evidence tending to show that the only consideration of the note sued on was the transfer by Winston to defendant of the interest of Winston in the Atchison bonds, as part of the profits of the contract for the construction of the Atchison Branch.

Defendant thereupon offered evidence tending to show that upon a settlement of the partnership accounts, between said Winston and his partners in the contract for the construction of said Atchinson Branch, the said Winston would have had no interest in the profits of said contract, having received more than his share thereof prior

to the giving of said note, which evidence was offered as tending to show that the consideration for such note had wholly failed.

To all of which evidence so offered plaintiff objected as incompetent and irrelevant, and the court having received the same subject to the objections on final consideration the objections were sustained by the court, & all such evidence excluded.

To which opinion of the court in excluding such evidence defendant at the time excepted.

The plaintiff offered evidence tending to contradict that of defendant last above stated.

It appearing in evidence that this suit is prosecuted by George W. DeCamp, one of the attorneys for plaintiff, under an agreement that said DeCamp shall pay all expenses incident to the
60 prosecution, and shall receive for his services 40 per cent. of the net proceeds collected from defendant, the defendant moved the court on this account to dismiss this suit, but the court overruled the motion.

To which opinion of the court defendant at the time excepted.

And thereupon afterwards on the 9th day of January, 1882, the court rendered judgment against the defendant for the sum of $11,401.61 and costs.

To which opinion of the court of rendering judgment against defendant, defendant at the time excepted.

And now asks that this bill of exceptions be signed, sealed, and made a part of the record in this case.

GEO. W. McCRARY,
Circuit Judge.

Said bond is as follows, to wit:

Know all men by these presents that we, James N. Burnes, as principal, and Calvin F. Burnes and Daniel D. Burnes, as sureties, are held and firmly bound unto Milton Courtright in the full and just sum of fifteen thousand dollars, to be paid to the said Milton Courtright; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of June, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at the May term, A. D. 1882, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between Milton Courtright, plaintiff, and James N. Burnes, defendant, judgment was rendered against the said defendant, James N. Burnes, and the said James N. Burnes having obtained a writ of error of the said court to reverse
61 the judgment in the aforesaid suit, and a citation directed to the said Milton Courtright citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., on the second Monday of October next:

Now the condition of the above obligation is such that if the said James N. Burnes shall prosecute said writ to effect and answer all

damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JAMES N. BURNES. [SEAL.]
CALVIN F. BURNES. [SEAL.]
DANIEL D. BURNES. [SEAL.]

Signed and delivered in presence of—

_____ _____.

Witness to signature of Calvin F. Burnes—
EDW. P. CURTIS.

Approved by—
A. KREKEL, *Judge.*

UNITED STATES OF AMERICA, }
Western District of Missouri, } *sct:*

Before me, Robert S. Musser, United States commissioner for said district, personally appeared D. D. Burnes, to me well known, who, upon oath, states that he is worth, over and above his indebtedness, the sum of thirty thousand dollars, and that he owns real and personal property to that amount subject to execution in Buchanan county, Jefferson county, and in the city of St. Louis.

D. D. BURNES.

Subscribed and sworn to before me, this 13th day of June, 1882.

R. S. MUSSER,
Com'r U. S. Cir. C't, West. Dist., West. Div. of Missouri.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *sct:*

62 Before me, Robert S. Musser, United States commissioner for said district, personally appeared Calvin F. Burnes, to me well known, who, upon oath, states that he is worth, over and above all his indebtedness, the sum of thirty thousand dollars, and that he owns real property to that amount subject to execution in the city of St. Louis, and in Platte and Buchanan counties.

CALVIN F. BURNES.

Subscribed and sworn to before me, this 13th day of June, 1882.

R. S. MUSSER,
Com'r U. S. Cir. C't, West. Dist., West. Div. of Missouri.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *sct:*

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine. I further certify that said bond is good and sufficient.

Witness my hand this 13th day of June, 1882.

R. S. MUSSER,
Com'r U. S. Cir. C't, West. Dist., West. Div'n Mo.

The opinion of the court in the above cause is as follows, to wit:

63 In the Circuit Court of the United States for the Western District of Missouri, Western Division. November Term, A. D. 1881.

MILTON COURTRIGHT *against* JAMES N. BURNES.

Action upon a promissory note for $7,333.00, executed by defendant to one F. H. Winston, and by him transferred after maturity to the plaintiff.

Besides a general denial the defendant answers as follows:

For further answer to said petition says that before and at the time of the making of the pretended note in said petition described said plaintiff, this defendant, and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the city of Atchison, Kansas, from a point on the Chicago and Southwestern railroad, which road was known as the Atchison Branch of the Chicago and Southwestern railroad. Prior to the date of said pretended note said Winston had been in charge of the construction of the branch road for said partners under said contract, and had received and then had in his possession as part of the assets under such contract forty bonds of the city of Atchison for the sum of one thousand dollars each, belonging to said partners, subject to the payment of the partnership debts, and a distribution among said partners after such payment in proportion to their respective interests therein.

Shortly before said pretended note was made said partners made, constituted, and appointed this defendant as trustee for said partners to take charge of said partnership business.

64 That at the time of making said pretended note said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership or in said bonds been ascertained; that at the time of making said pretended note said Winston turned over to this defendant, as trustee of said partners as aforesaid, said bonds and other assets in his hands belonging to said partnership, with the consent of said partners, and for the benefit of said partnership; that at the time said Winston turned over to defendant said bonds and assets said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money, arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due by said partnership and the result of said settlement. Said Winston therefore requested this defendant, as the trustee of said partners of whom plaintiff was one, to make said note with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account of said bonds on a settlement among said partners. Defendant executed said pretended

note with such understanding between said Winston and himself, as trustee of said partnership, and not as the separate note of this defendant. Said pretended note so executed, was assigned to said Winston for the benefit of plaintiff to one G. W. DeCamp, and by said DeCamp to plaintiff, without any consideration from said DeCamp to Winston, nor from said plaintiff to DeCamp, and with full knowledge by said DeCamp and plaintiff of said facts re-
65 lating to said note, and such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said DeCamp and plaintiff and Winston that this defendant should not be sued upon said note.

And this defendant says that said note — and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners are interested in the same and are necessary parties to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership can be had.

For further answer to said petition said defendant says said plaintiff ought not to have or maintain his said action because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and Geo. W. DeCamp, his attorney, by which said DeCamp agrees to prosecute such suit and to pay all the expenses incident to the prosecution of the same in consideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit, four-tenths of the amount so recovered; which said agreement is illegal, and against public policy and good morals. Defendant, therefore, asks to be discharged, with his costs.

This case was tried before the court by agreement of parties, a jury being waived.

McCRARY, *Circuit Judge:*

The answer alleges that this suit is being prosecuted by one of the attorneys for the plaintiff upon a champertous contract, by which he is to pay the expenses of the litigation and receive as his compensation forty per cent. of the sum realized, and the defendant
66 moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the plaintiff himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note by proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon upon the ground that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it? The authorities upon this question are in conflict. Some courts have held that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper

manner it should refuse longer to entertain the proceeding. (Barker *et al. vs.* Barker *et al.*, 14 Wis., 142; Webb *vs.* Armstrong, 5 Humph., 379; Morrison *vs.* Deadrick, 10 Humph., 342; Greenman *vs.* Cohen, 61 Ind., 201.)

Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defence thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. (Hilton *vs.* Woods, L. R., 4 Eq. Cas., 432; Elborough *vs.* Ayers, L. R., 10 Eq. Cas., 367; Whitney *vs.* Kirtland, 27 N. J. Eq., 333; Robinson *vs.* Beale, 26 Ga., 17; Allison *vs.* R. Co., 42 Iowa, 274; Small *vs.* R. Co., 8 N. W. Rep., 67.)

This latter view is, in my judgment, supported by the better reason. It is not necessary, for the full protection of the client, to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement, nor are there any reasons founded in public policy that should require such dismissal. If all champ-
67 pertous agreements shall be held void and the courts firmly refuse to enforce them, they will thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid or binding contract may avoid liability, or prevent a recovery by proving a champertous agreement for the protection of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such a case is no party to the champerty; he is not interested in it or in any wise injured by it. If the contract upon which he is sued is a *bona fide* contract upon which a sum of money is due from him to the plaintiff, and if he has no defence upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fees and expenses of the suit. The tendency in the courts of this country is strongly in the direction of relaxing the common law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client then was formerly allowed; and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the States the common law rule is altogether repudiated, and it is held that no such contract is now invalid, unless it contravenes some existing statute of the State. (Sedgewick *vs.* Scamon, 14 N. Y., 289; Dugin *vs.* Ireland, 14 N. Y., 322; Voorheis *vs.* Dorr, 51 Barb., 580; Richardson *vs.* Rowland, 40 Conn., 572; Matthewson *vs.* Fitch, 22 Cal., 86; Huffman *vs.* Vallejo, 45 Cal., 564; Lytle *vs.* State, 17 Ark., 609.) The common law doctrine, how-
68 ever, prevails in Missouri according to the decision of the supreme court of that State in Duke *vs.* Harper, 66 Mo., 55. While following that ruling I am disposed, in view of the general tendency of the American courts, to relax somewhat the rigor of *of* the English rule to apply it only to the champertous contract itself,

and not to allow debtors to make use of it to avoid payment of their honest obligations. It follows that the defence of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

This brings us to the consideration of the case upon its merits. The first defence as set forth in the answer is, in substance, that the note sued on was not intended to bind the defendant to pay the sum therein named thirty days after date, as appears on its face, but was intended as a mere memorandum to show that Winston, the payee, claimed an interest amounting to $7,333.00 in certain bonds turned over by him to defendant, and for which defendant was to account to him in the settlement of certain partnership affairs. In other words, it is claimed that the note sued on was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with and repugnant to its terms. The note is in the usual form of a negotiable promissory note. The alleged understanding or agreement relied upon by defendant is not in writing, and the proof of it, so far as there is any proof, is in the parol testimony of the defendant. The testimony of Winston, the other party to the note, is directly in conflict with that of the defendant, and if it were necessary to decide the question of fact, I should feel bound to say that Winston's state-
69 ments corroborated and confirmed, and they are by the writing itself made at the very time of the contract, and presumably embodying the understanding of the parties, would prevail over the testimony of the defendant. But it is not necessary to decide this question, because it is perfectly clear that all parol testimony to show a contemporaneous agreement in conflict with the plain terms of the note must be rejected. The rule which excludes such testimony is fundamental and elementary, and its application to this defence is too apparent to require argument or the citation of authorities. The contract signed by the defendant plainly declares that he is, for value received, to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defence would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains. The evidence was, however, received, and may, perhaps, be considered as tending to support the other defence set up in the answer, which is that the note was without consideration. To establish this defence the defendant has attempted to prove (1) that the note was given to represent the interest of Winston in certain bonds which belonged to a partnership, of which plaintiff and defendant, as well as Winston, were members, and which were, at the date of the note, turned over by Winston to defendant, and (2) that said Winston had in fact no interest in said bonds, because he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs. Ordinarily the defence of want of consideration may be made at law, but is such the case when a determination of the question of consideration depends upon the settlement of the affairs of a partnership,

70 some of the members of which are not before the court? Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this court, setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for injunction was resisted in this court at the last term. Upon full argument it was held by this court that the defence to the note, upon the facts stated in the bill, should be made in equity.

Mr. Justice Miller, in delivering the opinion of the court, said: "As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer." Notwithstanding this decision the defendant saw fit to dismiss his bill in chancery, and to make his defence at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown upon a settlement of the partnership affairs between Burnes, Courtright, Winston, and others, who are interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the court in this case shows that upon such a settlement it would appear that Winston had no interest in the bonds for which the note was given.

71 But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him. I have, in considering the defence of want of consideration, assumed that the note sued on was given by the defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs, and not to be a charge against the defendant personally, but whether this assumption is in accordance with the facts I do not decide. The testimony upon the question is quite conflicting, and it is not necessary to decide it, because in any view of the case the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit. (Sturges *vs.* Swift, 32 Miss., 239; Andrews *vs.* Robinson, 32 Miss., 241; Gibson *vs.* Moore, 6 N. H., 547.)

Judgment for the plaintiff for the amount of the note and interest.

G. W. DE CAMP AND BOTSFORD & WILLIAMS,
For Plaintiff.

HALL, STRINGFELLOW, AND WATERS,
For Defendant.

72 MILTON COURTRIGHT, Plaintiff,
against
JAMES N. BURNES, Defendant.

The counsel for the defendant asks the court to declare the law to be as follows:

1st. If the court finds from the evidence that F. H. Winston was a partner in and entitled to a part of the profits resulting from the construction of the Atchison Branch of the Chicago and Southwestern railroad, and that at the time the note in suit was executed by defendant and delivered to said Winston it was so executed and given in consideration of said Winston's interest in the $40,000 of Atchison city bonds mentioned in the evidence, and that at the time said note was executed said Winston had received his full share of all profits arising from the construction of said Atchison Branch, then the said Winston had no interest in said Atchison city bonds and the note was executed without consideration, and the finding must be for the defendant, providing the court finds from the evidence that said Atchinson city bonds were the property of the contractors who built said Atchison Branch and that Winston's interest in said bonds was founded upon his rights as one of said contractors.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

2. That if the court finds from the evidence that F. H. Winston was the agent and trustee of the defendant-, Winston, Courtright, and others, and that in his capacity as such trustee he received the $40,000 of Atchison city bonds and held them as the property of those for whom he was acting as trustee; that whilst said
73 Winston was trustee as aforesaid the parties in interest and owning said bonds directed said Winston to deliver the same to the defendant, and that said Winston, at the time he delivered said bonds, induced defendant to execute to him, the said Winston, the note in suit, to be held by him as evidence of Winston's interest in said Atchison city bonds, and that it was understood and agreed at the time said note was executed, between the payer and payee, that the note was not to be paid until Winston's interest in said bonds was ascertained and settled, and that said Winston, at the time said note was executed, had no interest in said bonds that had not been fully paid to him, then the finding must be for defendant.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

3. The court declares the law to be that if the court finds from the evidence that the note sued upon was executed by defendant and delivered by him to F. H. Winston for said Winston's interest in the Atchison city bonds mentioned in the evidence, and that at the time said note was so executed said Winston had no interest in said bonds, then the finding must be for defendant.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

4. The counsel for defendant asks the court to declare the law to be, that if the court finds from the evidence that the note in suit was exe-

cuted by defendant, that the consideration for such note was the transfer, by Winston, the payee, to the defendant of the interest of Winston in forty bonds of the city of Atchison for $1,000 each, and that the only interest said Winston had in such bonds was be-
74 cause such bonds were a portion of the profits of the contract for construction of the Atchison Branch of the Chicago & Southwestern railroad, and said Winston's interest in such profits was only by virtue of his interest in such contract, and that at the time of the execution of such note said Winston had, in fact, received his full share of the profits of such contract, then said Winston had no interest in said bonds, and said note was without consideration, and the finding must be for the defendant.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

5. The court declares the law to be that if from the evidence that the plaintiff employed George W. DeCamp to institute this suit, and that the same is now being prosecuted under an agreement by which said DeCamp is to pay every expense incident to the prosecution of this suit to final issue, and to receive for his compensation a portion of the net proceeds which may be realized from defendant, then this suit is prosecuted under a champertous contract, and ought to be dismissed at plaintiff's cost.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

6. If the defendant, the plaintiff, F. H. Winston, and Campbell were entitled to their respective interests in the contract for the construction of the Atchison Branch of the Chicago and Southwestern railroad, as stated in the Glover declaration of trust, and if said Winston, as the trustee of the parties in interest, had possession of the assets belonging to them under said contract on the 10th day of October, 1872, and if on said last-mentioned day said Winston
75 resigned his position as such trustee, and defendant Burnes was appointed by all the parties in interest as his successor, then it was the duty of said Winston to turn over to his successor all the assets and property in his hands as such trustee, and if defendant, in order to get possession as such trustee of the funds or property belonging to said trust, and compelled to and did execute to Winston the note sued on, and if plaintiff took said note after maturity, then plaintiff cannot recover thereon.

MILTON COURTRIGHT, Plaintiff, *against* JAMES N. BURNES, Defendant.

7th. If the defendant, the plaintiff, F. H. Winston, and others were partners in respect to the construction of the Atchison Branch of the Chicago and Southwestern railroad and the profits arising therefrom, and if said Winston, one of the partners, had possession of the assets of such copartnership as its agent or trustee, and if defendant, by agreement between the members of said copartnership, became the agent or trustee in place of said Winston, and in order to get the assets of said copartnership as such agent or trustee for the use and benefit of the parties in interest, and upon no other con-

sideration, was compelled to and did give said Winston the note sued on, then neither said Winston nor the plaintiff, his assignee, can maintain an action at law upon said note against defendant, their copartner.

76 UNITED STATES OF AMERICA, *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true and complete transcript of record in the cause therein named as fully as the same appears in my office.

Witness my hand as clerk, and the seal of said court. Done at office in Kansas City, Missouri, this 4th day of October, A. D. 1882.

[Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.]

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

Endorsed on cover: W. Missouri C. C. U. S. No. 187. James N. Burnes, plaintiff in error, *vs.* William L. Scott & Joseph McCarter, executors of Milton Courtright, deceased. Filed 20th January, 1883.

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JAMES H. McKENNEY,
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IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 187.

JAMES N. BURNES,

Plaintiff in Error,

vs.

WILLIAM L. SCOTT and JOSEPH McCARTER,
Executors of Milton Courtright, deceased,

Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF B. F. STRINGFELLOW,

For Plaintiff in Error.

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JAMES N. BURNES,
Plaintiff in Error,

AGAINST

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Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF B. F. STRINGFELLOW,

FOR PLAINTIFF IN ERROR.

Statement of Case.

This was an action at law instituted by Milton Courtright, deceased, against James N. Burnes, the plaintiff in error, in the Circuit

Court of the United States for the Western District of Missouri, by petition filed on the 29th of March, A. D. 1878. The petition sets forth several causes of action, and will be found on pages 3 to 7 of transcript.

As the petition was dismissed as to all the causes of action but the last, that only will be noticed. The last cause of action, designated in the pleadings as the second cause of action, and on which alone trial was had (as will be seen stated in the opinion of Judge McCrary who tried the cause, page 32 of record), will be found on pages 6 and 7 of record, and is as follows:

"And this plaintiff, for a further cause of action, states that on the 10th day of October, A. D. 1872, at the City of Chicago, Illinois, the defendant, by his promissory note of that date herewith filed and marked Exhibit "A," did promise to pay, thirty days after date, to the order of F. H. Winston, seven thousand three hundred and thirty-three ($7,333.00) dollars, payable at the Cook County National Bank in Chicago, value received, and then and there delivered said note to said F. H. Winston, which said note said Winston afterwards endorsed, and for a valuable consideration delivered to George W. DeCamp, for this plaintiff, who then became the endorsee, and now is the holder and owner thereof, and that no part of said note has been paid to this plaintiff.

"Wherefore this plaintiff prays judgment against said defendant for the sum of seven thousand, three hundred and thirty-three ($7,333.00) dollars, the amount of said note, with interest thereon since the 10th day of November, 1872."

After various proceedings and pleadings, defendant below (plaintiff in error) filed a second amended answer to the petition, which will be found on pages 23 to 25 of record, and which is as follows:

"Defendant, James N. Burnes, by his attorney, for amended answer to plaintiff's petition, says:

"1st. He denies each and every allegation in said petition.

"2d. For further answer to said petition, says, that before and at the time of making of the pretended note, in said petition described, said plaintiff, this defendant, and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the City of Atchison, in Kansas, from a point on the Chicago and Southwestern Railroad, which road was known as the Atchison Branch of the Chicago and Southwestern Railroad. Prior to the date of said pretended note, said Winston had been in charge of the con-

struction of said branch road for said partners under said contract, and had received and then had in his possession, as part of the assets under such contract, forty bonds of the City of Atchison, for the sum of one thousand dollars each, belonging to said partners, subject to the payment of the partnership debts, and a distribution among said partners after such payment, in proportion to their respective interests therein.

Shortly before said pretended note was made, said partners made, constituted and appointed the defendant as trustee for said partners, to take charge of said partnership business, in place of said Winston, and to wind up said business. That at the time of making said pretended note said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership, or in said bonds, been ascertained. That at the time of making said pretended note said Winston turned over to this defendant, as trustee of said partners, as aforesaid, said bonds and other assets in his hands belonging to said partnership, with the consent of said partners and for the benefit of said partnership; that at the time said Winston turned over to the defendant said bonds and assets said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business, said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due by said partnership and the result of said settlement. Said Winston therefore requested this defendant, as the trustee of said partners, of whom plaintiff was one, to make said note, with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston, on account of said bonds, on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself, as trustee of said partnership, and not as the separate note of this defendant. Said pretended note, so executed, was assigned by said Winston, for the benefit of plaintiff, to one G. W. DeCamp, and by said DeCamp to plaintiff, without any consideration from said DeCamp to Winston, nor from said plaintiff to DeCamp, and with full knowledge by said DeCamp and plaintiff of said facts relating to said note, and that such were made long after the time at which said note was due, as appeared

on its face, and upon the further consideration and agreement between said DeCamp and plaintiff and Winston that this defendant should not be sued upon said note.

And this defendant says that said note was and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners are interested in the same, and are necessary partners to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership can be had.

For further answer to said petition, said defendant says, said plaintiff ought not to have or maintain his said action, because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and George W. DeCamp, his attorney, by which said DeCamp agrees to prosecute such suit, and to pay all the expenses incident to the prosecution of the same, in consideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit—four-tenths of the amount so recovered. Which said agreement is illegal, against public policy and good morals.

Defendant therefore asks to be discharged, with his costs."

The plaintiff below replied to this answer as follows:

"Plaintiff, for reply to the second amended answer of defendant herein, and to each and every count thereof, denies each and every allegation in said answer, and in each and every count thereof."

A jury was waived, and a trial had by McCrary, Justice, on the 2d of November, 1881; case taken under advisement until January, 1882, when judgment was rendered against plaintiff in error for eleven thousand four hundred and one dollars and sixty cents ($11,401.60). See pages 26 and 27 of record.

Plaintiff in error then filed his motion for a new trial (page 27 of record) and by consent had until the May Term to file bill of exception. Pages 27 and 28 of record.

In addition to and in connection with the answer, plaintiff in error filed a motion to dismiss the action, for the reason that the same had been instituted, and was being prosecuted by George W. DeCamp, an attorney for the plaintiff below, under a champertous contract, as set out in the record. Page 21 of the record.

The motion for a new trial was overruled, and the decision of the Court in so overruling such motionduly excepted to. See page 28 of record.

The bill of exceptions, signed by the Judge, will be found on page 28 of the record.

The opinion of McCrary, Judge, in rendering his judgment will be found on pages 32 to 36 inclusive, of record, and is as follows:

Opinion of the Court by McCrary, Judge.

In the Circuit Court of the United States for the Western District of Missouri, Western Division, November Term, A. D. 1881.

Milton Courtright
vs.
James N. Burnes.

Action upon a promissory note for $7,333.00, executed by defendant to one F. H. Winston, and by him transferred after maturity to the plaintiff. Besides a general denial the defendant answers as follows:

For further answer to said petition says that before and at the time of the making of the pretended note in said petition described, said plaintiff, this defendant and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the City of Atchison, Kansas, from a point on the Chicago and Southwestern Railroad, which road was known as the Atchison Branch of the Chicago and Southwestern Railroad. Prior to the date of said pretended note said Winston had been in charge of the construction of the branch road for said partners under said contract, and had received and then had in his possession as part of the assets under such contract forty bonds of the City of Atchison for the sum of one thousand dollars each, belonging to said partners, subject to the payment of the partnership debts, and a distribution among said partners after such payment, in proportion to their respective interests therein.

Shortly before said pretended note was made said partners made, constituted and appointed this defendant as trustee for said partners to take charge of said partnership business.

That at the time of making said pretended note said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership or in said bonds been ascertained; that at the time of making said pretended note said Winston turned over to this defendant, as trustee of said partners as aforesaid, said

bonds and other assets in his hands belonging to said partnership, with the consent of said partners, and for the benefit of said partnership; that at the time said Winston turned over to defendant said bonds and assets, said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money, arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due by said partnership and the result of said settlement. Said Winston therefore requested this defendant, as the trustee of said partners, of whom plaintiff was one, to make said note with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account of said bonds on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself, as trustee of said partnership, and not as the separate note of this defendant. Said pretended note so executed, was assigned by said Winston for the benefit of plaintiff to one G. W. DeCamp, and by said DeCamp to plaintiff without any consideration from said DeCamp to Winston, nor from said plaintiff to DeCamp, and with full knowledge by said DeCamp and plaintiff of said facts relating to said note, and such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said DeCamp and plaintiff and Winston that this defendant should not be sued upon said note.

And this defendant says that said note is wholly without consideration, and is null and void; and that said note is based upon and grew out of transactions relating to the business of said partners; that said partners were interested in the same and are necessary parties to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership can be had.

For further answer to said petition said defendant says, said plaintiff ought not to have or maintain his said action because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and George W. DeCamp, his attorney, by which said DeCamp agrees to prosecute such suit and to pay all the expenses incident to the prosecution of the same, in con-

sideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit: four-tenths of the amount so recovered; which said agreement is illegal, and against public policy and good morals. Defendant therefore asks to be discharged, with his costs.

This case was tried before the Court by agreement of parties, a jury being waived.

McCrary, Circuit Judge:

The answer alleges, that this suit is being prosecuted by one of the attorneys for the plaintiff, upon a champterous contract, by which he is to pay the expenses of the litigation, and receive as his compensation, forty per cent. of the sum realized. And the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the plaintiff himself being quite conclusive upon that point. This makes it necessary for the Court to decide the important question, whether the plaintiff can be defeated in his action upon the note, by proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof, or prevent a recovery thereon, upon the ground the holder of the note had made a void and unlawful agreement with an attorney for the prosecution of a suit upon it? The authorities upon this question are in conflict. Some Courts have held that if the fact, that a suit is being prosecuted upon a champertous contract, comes to the knowledge of the Court in any proper manner, it should refuse longer to entertain the proceeding. (Barker *et al.* vs. Barker *et al.*, 14 Wis., 142; Webb vs. Armstrong, 5 Humph., 379; Morrison vs. Deadrick, 10 Humph., 342; Greenman vs. Cohen, 61 Ind., 201.)

Other Courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. (Hilton vs. Woods, L. R., 4 Eq. Cas., 435; Elborough vs. Ayers, L. R., 10 Eq. Cas., 367; Whitney vs. Kirtland, 27 N. J. Eq., 333; Robinson vs. Beale, 26 Ga., 17; Allinson vs. R. Co., 42 Iowa, 274; Small vs. R. Co., 8 N. W. Rep., 67.)

This latter view, is in my judgment, supported by the better reason. It is not necessary, for the full protection of the client, to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement, nor are there any reasons founded in pub-

lic policy that should require such dismissal. If all champertous agreements shall be held void, and the Courts firmly refuse to support them, they will thereby be discouraged and discountenanced to the same extent, and in the same manner, as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid or binding contract, may avoid liability or prevent a recovery, by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement, reaching very far beyond that which attaches to any other illegal contract. The defendant in such a case is no party to the champerty; he is not interested in it, or in anywise injured by it. If the contract upon which he is sued is a *bona fide* contract upon which a sum of money is due from him to the plaintiff, and if he has no defense upon that contract, I can see no good reason for holding that he may be released, by showing that the plaintiff has made a void and unlawful agreement with his attorney, concerning the fees and expenses of the suit. The tendency in the Courts of this country is strongly in the direction of relaxing the common law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed; and this for the reason, that the peculiar condition of society, which gave rise to the doctrine, has in a great measure passed away. In some of the States the common law rule is altogether repudiated, and it is held that no such contract is now invalid, unless it contravenes some existing statute of the State. (Sedgwick vs. Scammon, 15 N. Y., 289; Dugin vs. Ireland, 14 N. Y., 322; Voorheis vs. Dorr, 51 Barb., 580; Richardson vs. Rowland, 40 Conn., 572; Matthewson vs. Fitch, 22 Cal., 86; Huffman vs. Vallejo, 45 Cal., 564; Lytle vs. State, 17 Ark.: 609). The common law doctrine, however, prevails in Missouri according to the decision of the Supreme Court of that State in Duke vs. Harper, 66 Mo., 55. While following that ruling, I am disposed, in view of the general tendency of the American Courts, to relax somewhat the rigor of the English rule; to apply it only to the champertous contract itself, and not to allow debtors to make use of it to avoid payment of their honest obligations. It follows, that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

This brings us to the consideration of the case upon its merits. The first defense as set forth in the answer is, in substance, that the note sued on was not intended to bind the defendant to pay the sum

therein named, thirty days after date, as appears on its face, but was intended as a mere memorandum to show that Winston, the payee, claimed an interest amounting to $7,333 in certain bonds turned over by him to defendant, and for which defendant was to account to him in settlement of certain partnership affairs. In other words, it is claimed that the note sued on was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with, and repugnant to its terms. The note is in the usual form of a negotiable promissory note. The alleged understanding or agreement relied upon by defendant is not in writing, and the proof of it, so far as there is any proof, is in the parol testimony of the defendant. The testimony of Winston, the other party to the note, is directly in conflict with that of the defendant, and if it were necessary to decide the question of fact, I should feel bound to say that Winston's statements corroborated and confirmed, as they are by the writing itself, made at the very time of the contract, and presumably embodying the understanding of the parties, would prevail over the testimony of the defendant. But it is not necessary to decide this question because it is perfectly clear that all parol testimony, to show a contemporaneous agreement in conflict with the plain terms of the note, must be rejected. The rule which excludes such testimony is fundamental and elementary, and its application to this defense is too apparent to require argument or the citation of authorities. The contract signed by the defendant plainly declares that he is, for value received, to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defense would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains. The evidence was, however, received, and may perhaps be considered as tending to support the other defense set up in the answer, which is that the note was without consideration. To establish this defense, the defendant has attempted to prove:

1st. That the note was given to represent the interest of Winston in certain bonds which belonged to a partnership of which plaintiff and defendant as well as Winston were members, and which were at the date of the note, turned over by Winston to defendant; and

2d. That said Winston had in fact no interest in said bonds, be-

cause he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs. Ordinarily, the defense of want of consideration may be made at law; but is such the case, when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the Court? Even if this were an open question, I should not hesitate to hold, that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this Court, setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for injunction was resisted in this Court at the last term. Upon full argument it was held by this Court, that the defense to the note, upon the facts stated in the bill, should be made in equity.

Mr. Justice MILLER, in delivering the opinion of the Court, said: "As to the general fact, that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again, "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer."

Notwithstanding this decision the defendant saw fit to dismiss his bill in chancery, and to make his defense at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown upon a settlement of the partnership affairs between Burnes, Courtright, Winston and others, who are interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the Court in this case shows that upon such a settlement, it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him.

I have, in considering the defense of want of consideration, assumed that the note sued on was given by the defendant for the interest of Winston in the bonds above named, and was to be settled

upon a settlement of the partnership affairs, and not to be a charge against the defendant personally; but whether this assumption is in accordance with the facts I do not decide.

The testimony upon the question is quite conflicting, and it is not necessary to decide it, because in any view of the case the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit (Sturges vs. Swift, 32 Miss., 239; Andrews vs. Robinson, 32 Miss., 241; Gibson vs. Moore, 6 N. H., 547).

Judgment for the plaintiff for the amount of the note and interest.

Questions Involved.

It will be seen that the questions involved are all questions of law; they are all raised by the action of the Court, in overruling the motion of defendant in error, to dismiss the action as one prosecuted under a champertous agreement; in excluding testimony on the trial; in the opinion of the Court and its charge; in refusing the instructions of the plaintiff in error; in overruling the motion for a new trial, and in rendering judgment against the plaintiff in error.

Errors Specially Assigned.

1. In overruling the motion to dismiss the action as being prosecuted under a champertous contract between Courtright, the plaintiff below, and his attorney, Decamp (pp. 21–30 of transcript).

2. In refusing to dismiss the action on the trial on proof of such contract.

3. In excluding the evidence offered by defendant below plaintiff, in error, to support the second defense in the answer; to be found on p. 29 of transcript, and which is in substance as follows:

That Winston, the payee and assignor of the note sued on, the plaintiff below, one Campbell, and the plaintiff in error, were the the contractors for the construction of the Chicago and Southwestern Railroad and the Atchison Branch, as partners, and that Winston was entitled to ($\frac{2}{15}$) two-fifteenths of the profits of such branch contract. That the road was constructed in 1871; that Winston had charge of the execution of the contract, and the possession and control of the assets arising therefrom; that after the completion of the

road in October, 1872, Winston delivered to plaintiff in error, as trustee for all the partners, forty bonds of the City of Atchison for one thousand dollars each, which had been received by him and were then held as part of the assets under such contract.

That such bonds were delivered by Winston to and received by plaintiff in error as *trustee* for the partners in interest in such contract.

That at the time such bonds were so delivered plaintiff in error gave the note sued on.

That the note sued on when given was not intended by the plaintiff in error, the maker, nor by Winston, the payee, as a note, but only as a memorandum of the then estimated value of the interest of Winston in such bonds to be accounted for ona settlement between the partners to the contract.

4. In excluding all the evidence offered by plaintiff in error in support of his third defense; want of consideration as set up in his answer, and which is in substance as follows, as set out on pp. 28–29 of transcript:

1st. A copy of the books of Milton Courtright, the plaintiff below, and of the Atchison Branch, kept under the supervision of Winston as president of the road and as trustee for himself, Courtright the plaintiff below, and the other partners in the contract, and the accounts therein, showing the amounts paid to Winston and Courtright on account of the construction of the Atchison Branch, for the purpose of showing that at the date of the note Winston and Courtright had *each* received more than his share of the profits from the contract. With evidence to prove that the original books were the books of Courtright, relating to the construction of said road, and of Winston as trustee of Courtright, touching the same; that the original books are in possession of the Chicago, Rock Island and Pacific R. R., a foreign corporation, at Chicago, in Illinois, and delivered to them as successors of the Atchison Branch in 1872 by Winston, and are part of the records of said C., R. I. and P. R. R. Co.

5. In excluding all evidence to show that the only consideration of the note sued on was the transfer by Winston the payee to Burnes the maker of the note and plaintiff in error, of the interest of Winston in certain bonds, part of the assets of a firm of which Winston was a member; and that before such transfer Winston had received more than his share of the entire assets of such firm, offered to show a want of consideration for such note.

6. In excluding all evidence offered in support of the third defense in the answer.

7. In the charge and opinion of the Court in declaring as follows:

1st. As to the defense of champerty:

"Other Courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney whem the champertous agreement itself is sought to be enforced. This latter view is, in my judgment, supported by the better reason."

"In some of the States the common law is altogether repudiated, and it is held that no such contract is now invalid, unless it contravenes some existing statute of the State. The common law doctrine, however, prevails in Missouri according to the decision of the Supreme Court of that State, in Duke vs. Harper, 66 Mo., 55. While following that ruling I am disposed, in view of the general tendency of the American Courts, to relax somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to allow debtors to make use of it, to avoid payment of their honest obligations. It follows, that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled."

2d. And in ruling as to the second defense of plaintiff in error, "the contract signed by the defendant plainly declares that he is, for value received, to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defense would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains."

7. In declaring as to the third defense which pleads want of consideration: "The evidence was, however, received, and may perhaps be considered as tending to support the other defense set up in the answer, which is that the note was without consideration. To establish this defense the defendant has attempted to prove:

1. That the note was given to represent the interest of Winston in certain bonds which belonged to a partnership, of which plaintiff and defendant, as well as Winston, were members, and which were, at the date of the note, turned over by Winston to defendant; and.

2. That said Winston had in fact no interest in said bonds because he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs.

Ordinarily the defense of want of consideration may be made at law; but is such the case when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the Court? Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this Court, setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for injunction was resisted in this Court at the last term. Upon full argument it was held by this Court that the defense to the note upon the facts stated in the bill should be made in equity.

Mr. Justice MILLER, in delivering the opinion of the Court, said: "As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer." Notwithstanding this decision, the defendant saw fit to dismiss his bill in chancery, and to make his defense at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown upon a settlement of the partnership affairs between Burnes, Courtright, Winston and others, who are interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the Court in this case shows, that upon such a settlement it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds, if the opportunity was afforded him. I have, in considering the defense of want of consideration, assumed that the note sued on was given by

the defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs, and not to be a charge against the defendant personally; but whether this assumption is in accordance with the facts I do not decide. The testimony upon the question is quite conflicting, and it is not necessary to decide it, because in any view of the case, the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit."

8. In declaring that the Court was concluded by the opinion of Judge MILLER, as cited, viz.:

"As to the general fact that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer."

9. In refusing all the instructions asked by plaintiff in error, and which will be found pages 37–38 of the transcript.

10. In refusing to grant a new trial to plaintiff in error (p. 27 of Transcript).

11. In rendering judgment against the plaintiff in error (p. 30, *Ib.*).

BRIEF OF ARGUMENT.

1. The defense of champerty against the prosecution of the suit, as made by the motion (p. 21 of Transcript), and on the trial (pp. 30, 33, of Transcript) is recognized by the English Courts and by most of the American Courts.

14 Wis., 154, Barker vs. Barker.
20 Wis., 475, affirming same.
29 Wis., 506, full on the question.
Story Eq. Jur., § 30.
61 Ind., 205, Greeman vs. Cohen.
5 How., 375, Webb vs. Armstrong.
7 Bush, 358.
1 Ohio, 148.
1 Pick., 415.
5 John. Ch., 44.
8 Ben. Mon., 488.
9 Met., 489.
26 Mo., 727.

2. On the proof that the copy was shown to be a true copy, and that, as beyond the jurisdiction of the Court, the production of the originals could not be compelled, the copy of the books offered was admissible.

As to their competency or relevancy we will remark further when considering the third defense.

3. As to the evidence, offered to sustain the second defense, by proof, that the instrument was not a note, but was given by the maker, as trustee, as a *memorandum* of the estimate of the then value of the interest of the payee in certain bonds, delivered by the payee to the maker, as trustee, to be held by him in trust for the payee and others interested in such bonds, as partners with the payee, to be accounted on a settlement of the partnership, we will submit its consideration without further argument, save as it may relate to the third defense—want of consideration for the note.

4. As to the third defense in the answer, the naked legal defense of want of consideration, we submit, as preliminary to and explanatory of, our argument:

1st. That while Judge McCrery correctly states this defense as being simply "*that the note sued on was without consideration,*" p. 35 of transcript.

Yet he does not correctly state the evidence offered to sustain this defense.

1st. It was not to prove as he says : (p. 35 of transcript.)

" That the note was given *to represent the interest of Winston* in certain bonds."

But, as seen by the bill of exceptions, p. 29, the evidence was offered to show :

" That the *only consideration* of the note was the *transfer* to *Burnes* of the *interest* of *Winston* " in the bonds.

2d. That the evidence referred to by Judge McCrary was part of that offered in support of the 2d, and not of the 3d defense.

3d. The Judge also errs in stating that " this evidence was received" (p. 30 of transcript.)

It was received, *subject to objection, and then excluded* (p. 29, transcript.)

Third Defense. Want of Consideration.

Opinion of the Court.

1st. The question as presented by this defence and the evidence offered to sustain it, as stated in the opinion of the Court, is as follows (p. 35 of transcript):

"Ordinarily the defense of want of consideration may be made at law, but is such the case when the determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the Court?"

We accept the admission, but deny the assumption made in the question propounded by the Court.

"The determination of the question of consideration" does not depend upon the settlement of the affairs of any partnership, but on proof of the consideration and its failure.

The *interest of Winston* in certain partnership assets, the sale of which interest was the consideration of the note, *did not depend* on a settlement of the affairs of the partnership, which might never be made, *but on acts precedent to the sale*, acts on which the settlement would depend.

2d. On the assumption above made the Court holds that in this case the "defendant must resort to a court of equity for relief."

The Court then proceeds to designate the *only relief* which the defendant can have in equity, by declaring that—

"Want of consideration for the note, if it can be shown at all, can *only be shown* upon a settlement of the affairs of the partnership between" all the members thereof, "and that a court of law is not competent to supervise such settlement."

On this we take issue.

Reasons of the Court for its Conclusion.

1st. The Court holds that the Court as to this question was concluded by the opinion of Justice Miller (see p. 36, Transcript).

The opinion of Justice Miller is given in our full argument, and shows that Justice Miller had not the question of want of consideration before him, and gave no opinion as to that question.

The bill in equity considered by him, related to the defense made

in the second plea, and *was based on a theory contradictory of the theory of the third defense.*

2d. The Court below says further: "Want of consideration of the note can only be shown upon a settlement of the affairs of the partnership," and "a court of law is not competent to supervise such settlement."

These are rather assumptions than arguments. We deny them.

1st. No settlement is necessary. Neither the answer, nor evidence offered to sustain it, refer to, rely on or make necessary any settlement.

The defense was a mere plea of want of consideration.

The evidence offered was sufficient to sustain the defense.

There is no question made as to the sufficiency of the evidence.

The evidence was *all excluded*, because, as held by the Court, the defense could *only be shown on a settlement to be made in a court of equity.*

2d. This defense can be made at law to a note, as this, given to a partner for his interest in partnership assets, as to a note given to any other vendor for his interest in other property, and it can be established in each case, by proof at law, that the vendor had no interest in the property sold.

It can, without showing any settlement, be proved at law that Winston at the time of the sale, had no interest in the bonds, the sale of his interest in which was, if any, the sole consideratin of the note.

By proof that—

He had already sold his interest.

Lindley on Part., 698 and Note.

Prior sale on execution against the partner.

29 Wend., 398, Philips vs. Cook.

2 Hill, 47, Waddell vs. Cook.

Lind. on Part., 688, 689.

Of prior sale of the the assets by the firm.

Of prior sale of the assets on execution against the firm.

By admissions of the plaintiff in the action.

By proof of insolvency of the firm, or of the vendor.

Proof that a partner had an interest, and its extent, can be made by him at law.

3 Denio, 125, Walsh vs. Adams.

With more reason, may a stranger prove that the vendor had no interest at the time of such sale.

3d. The Court says next:

"A court of law is not competent to supervise such settlement."

"Settlement," as used by the Court, we must assume is intended to be equivalent to the term "account," as used in the books, especially in view of the apparent purpose of the Court in its chief reason, viz., "that Winston and the other partners may have an opportunity to give other and further proof."

A court of law is competent:

1st. It is competent to receive proof of an account stated by partners of their affairs made by themselves which would make an account in equity unnecessary.

This is a common basis of an action at law.

2d. A court of law is competent to supervise a settlement of partnership affairs.

The old action for an account among partners is as old as chancery.

3d. It may be *inconvenient* in some cases, but that does not make the court of law *incompetent.*

There is nothing to show that in this case it was even inconvenient.

It may have been, as so many partnerships are, simple and easily determined.

4th. The opinion admits that the evidence offered, and as it says, "before the Court," was sufficient to show the note without consideration.

No settlement in equity was needed to *procure* evidence to sustain the defense.

Why must defendant below in this case go into equity for relief?

Here we have the *real*, and regarded logically, the *only* reason for its conclusion given by the Court.

P. 36 of transcript the Court says:

"It is argued that the *evidence before the Court in this case* shows that upon such a settlement it would appear that *Winston had no interest in the bonds for which the note was given.*"

"But I cannot assume that the other members of the partnership who are not here would not be able if brought into a court of equity to make other and further proof."

"I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him."

To this we ask, why was it necessary that the other partners should be brought into equity to make further proof? Or why plaintiff in error must bring Winston into equity, to give him "an opportunity to show that he had an interest in the bonds"?

They were all competent witnesses, and had the opportunity to give all the testimony at law which they could give in equity. Of the five partners the three principal were, in fact, in Court; Courtright and Burnes as parties, and Winston as a witness.

Why should the defendant below be compelled to go into equity to give them an opportunity to make *further* proof to *defeat* his defense?

Courtright, if either, should seek the aid of equity for such relief. Burnes did not need it!

Defendant, with ample evidence to sustain his defense at law—evidence "before the Court"; his defense, an ordinary defense at law, is to go into equity that an opportunity may be given to procure other evidence to defeat his defense!

He cannot go into equity for relief.

On the defense and the evidence to sustain it, the plaintiff in error

1st. Needs no relief which a court of equity can give.

2d. Cannot go into equity.

3d. Cannot go for a settlement.

4th. Cannot go for a discovery.

5th. Must abandon his defense, and repudiate his testimony to go into equity.

6th. Cannot go into equity to give opportunity to Winston, or his partners, to give proof to defeat the defense!

1st. Plaintiff in error needs no relief which a court of equity can grant.

The only relief, which it can be imagined that plaintiff in error *needs*, is the *admission of the evidence* which he had before the Court, admitted to be sufficient to sustain his defense.

A court of equity cannot compel the court of law to entertain the defense and receive this evidence.

This Court alone, as a court of law, can give this relief.

2d. The plaintiff in error in this case cannot go into equity for relief.

The only relief in the power of a court of equity in a case like this, would be the relief suggested by the Court, or a discovery. We consider them in the order named.

3d. Plaintiff in error cannot go into equity for a settlement of the affairs of the partnership named in the opinion.

The fact that Winston, the vendor and payee of the note, Burnes, the maker and purchaser, and Courtright, the assignee of the note, are all members of the firm, does not affect this question.

As to this transaction, Burnes, at least, is as a stranger to the firm, as any other stranger purchasing the interest of a partner.

As a stranger then, claiming no interest in the partnership or its assets; his defense based on a denial of any such interest, the plaintiff in error cannot go into equity for a settlement, or for an account.

Such account cannot be asked, merely to furnish evidence in a suit at law.

Nor can it be asked by one who has no interest in the firm, or its assets.

The other members of the firm have no interest in the litigation concerning the note, and cannot be vexed with a suit for a purpose in which they have no interest.

The bill for such a settlement must ask for a dissolution of the firm.

Daniels, Ch., Pl. & Pr., 332–333.

A stranger has no right to ask such a decree.

4th. He cannot go into equity for a discovery.

He could not allege that Courtright, the other party to the suit at law, was in possession of any evidence needed by plaintiff in error for his defense.

If he could give such evidence, there was no need to call on equity, the court of law having ample power to compel its production or to compel him to testify.

The reason given by the Court for compelling plaintiff in error to go into equity; that Winston and the other partners, who, as it says, "were not in Court," but were only as witnesses, might have "an opportunity to make and further proof," is conclusive against his right to go into equity for a discovery.

A bill in equity will not be entertained for the discovery of the evidence of *mere witnesses.*

Will lie only against a *party to the action.*

5th. To go into equity for relief, as proposed by the Court, for a settlement of the affairs of the partnership, the plaintiff must show that he has an interest in the partnership or its assets.

Standing as he does as to this transaction, which would be the foundation of the bill for relief, as a stranger to the partnership, his defense, denying all interest in the assets, and his evidence sustaining his defense, his bill for relief must repudiate his defense, and contradict his evidence.

The proposition answers itself. It is on a par with the other proposition, that he must go into equity to get other evidence to defeat his defense.

If the Court below be right in holding that plaintiff in error cannot make his defense at law, can only have relief in equity, "if at all," plaintiff in error is without relief, and a partner can sell his interest in property in which he has no interest and recover the purchase money. He can thus perpetrate a fraud which none but a partner could perpetrate.

ARGUMENT.

Champerty.

The question was properly presented, and the evidence conclusive.

By the long settled practice in the English Courts, and its general adoption in this country, the action ought to have been dismissed.

The rule is based on public policy, rather to protect the public than the parties engaged in the evil practice, and on the right of the Courts to refuse to be made parties to a crime.

This case is a strong illustration of the wisdom of the rule.

The evidence showed that the attorney DeCamp, party to the champertous contract, finding Winston harassed by a dangerous suit, compelled him to give him the note sued on by a threat to bring another vexatious suit against Winston (on a claim which Winston swears had no foundation) if he did not assign him this note.

The rule is even in greater need of strict enforcement in this day, when men are seeking fortune, rather by blackmail and sharp practices, than when it was adopted.

Then men sought redress by the strong hand, not by vexatious abuse of the law. Then there were Robin Hoods and robber knights. Now we have the sneak thief, the confidence man and the sharp lawyer, who speculates on the fears and misfortunes of the ignorant. Criminals, no less dangerous, far less manly than the bold robber of the day when this rule was adopted.

This the highest Court in our land should proclaim, that its halls shall not be open to, nor its protection thrown around, criminals who make those halls their dens, and can alone perpetrate their crimes by its protection.

2. As to the second defense, we will add nothing to what has been said in the brief, as we will have to refer to it, and the evidence offered in its favor, in considering the third defense, the defense affecting the merits in this case.

Third Defense.

Judge McCrary correctly states this plea as being simply "*that the note was without consideration.*" See p. 35 of record.

Other matters, it is true, are also set up in this plea; but the evidence offered and rejected, *related alone to the defense of want of consideration;* and hence only this defence is considered by the Court in its opinion as presented by this plea.

It is necessary, that the true character of this defence, as *a simple defense of want of consideration*, be distinctly impressed and remembered; that the error of Judge McCrary, in confounding this with with the second defense pleaded by the plaintiff in error, may be readily discovered.

Judge McCrary does not, however, correctly state in his opinion the evidence offered by defendant below, plaintiff in error, to sustain his third defense—want of consideration—and as this will also show that he confounded the 2d and 3d pleas of the defendant below, plaintiff in error, we cite his statement of the evidence, as offered, to sustain the 3d defense.

Evidence, as stated by Judge McCrary.

Referring to the evidence, which was offered by the plaintiff in error, he says:

"The evidence was, however, *received*, and may perhaps be considered as tending to support the *other defense set up in the answer; which is, that the note is without consideration.* To establish this defense, the defendant has attempted to prove:

1st. That the *note was given to represent the interest of Winston* in certain bonds which belonged to a partnership of which plaintiff and defendant, as well as Winston, were members, and which were, at the date of the note, *turned over* by Winston to the defendant.

2d. That said Winston had, in fact, no interest in said bonds, because he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs.

By reference to the bill of exceptions, p. 29 of record, it will be seen:

1st. That the evidence cited by the Judge, in his 1st proposition, was part of the evidence offered by the defendant below to support his 2d defense, and *was not offered to sustain his third defense.*

2d. That the evidence offered by defendant below, in support of his third defense, of want of consideration, was other and different evidence.

As stated in the bill of exceptions, "the defendant gave evidence tending to show that the *only consideration* of the note sued on was *the transfer by Winston to defendant of the interest of Winston in the Atchison bonds* as part of the *profits* of the contract for the construction of the Atchison Branch."

"The defendant then offered evidence tending to show that upon a settlement of the partnership accounts between said Winston and his partners in the contract for the construction of said Atchison Branch Winston *would have had no interest* in the profits of said contract, *having received more than his share thereof prior to the giving of said note*, which evidence was offered for the purpose of showing that the consideration for such note had wholly failed."

On p. 30 of record it will be seen that the Judge errs in saying in his opinion, as above cited, "this evidence was, however, received."

It *was received*, but *subject to the objections, and then excluded.*

The bill of exceptions says: "To *all which* evidence so offered plaintiff objected *as incompetent and irrelevant*, and the *Court, having received the same subject to the objections*, on final consideration the objections were sustained by the Court *and all the evidence excluded.*"

It is thus seen that Judge McCrary commits several errors in his statement above given—errors doubtless unintentional, and perhaps not material as affecting the issues, as they are all cured by the bill of exceptions.

But they serve to show that he not only misconstrued the opinion of Judge Miller, by confusing the 2d and 3d defenses, but even confuses the testimony relating to these defenses, and was thus led into his errors as to the 3d defense.

The evidence offered to sustain the 3d defense did not, as stated by him, tend to show "that the note was given *to represent* the interest of Winston in certain bonds," nor that such "bonds were *turned over* by him to Burnes; such evidence was offered to support the 2d defense, and was excluded.

Nor was any evidence offered in support of the 3d defense, that the *note was given by defendant Burnes, as trustee, or not, to be a charge against him personally, or to be settled on a settlement of the partnership affairs.*

All such evidence was offered to sustain the 2d defense.

The evidence offered to sustain the 3d defense was, on the theory of the Court, that the instrument sued on was a note, and to show it without consideration.

To show that its consideration, if any, was *the transfer* of *the interest* of *Winston* in the bonds.

And *that he had no interest to transfer.*

No evidence was offered, as implied by the Judge, that the note was given *to Winston, as trustee.* The statement of the Judge is also objectionable in that it represents the evidence as tending to show a *conclusion of law*, instead of a *fact.* Evidence proves facts; the Court draws conclusions. The evidence tended to prove the *fact that Winston had received more than his share;* the *conclusion*, that he had no interest; or, as loosely said in another place, that "it would appear on a settlement that he had no interest," would be for the Court, not for the witness.

We now ask the attention of the Court to the opinion of Judge McCrary, on pages 32 to 38, inclusive, of the printed record.

As to the defense of want of consideration, the opinion begins by the admission, that

"*Ordinarily* the defense of want of consideration *may be made at law.*"

This would seem to imply that, as this is an *ordinary* defense at law, there must be some extraordinary case in which it cannot be made at law. And it would seem as if such extraordinary case should be made clear to defeat this ordinary right.

The Judge has certainly presented an *extraordinary* case in the one *supposed* by him, and made the *basis* of his equally extraordinary argument to show that this is a case not governed by the ordinary rules—a case in which the defense can not be made at law.

He says:

"Ordinarily, the defense of want of consideration can be made at law."

Then asks:

"But is such the case when the *determination of the questions of consideration* depends upon the settlement of the affairs of a partnership, some of the members of which are not before the Court?"

This is an extraordinary proposition, and the more so in view of the declaration subsequently made "that a court of law cannot supervise such a settlement."

He *assumes* that "a settlement of the affairs of a partnership is *necessary* to the determination of the question"; that a court of law is not competent to make such settlement, and then asks can such defense be made at law?

On such *assumptions* "*the determination of the question*" would seem to be the simplest conclusion, and in no need of the reference to the opinion of Justice MILLER, nor to the extraordinary reasons given by Judge MCCRARY in support of his assumptions.

If, as he says, a settlement of partnership affairs be necessary to the determination of the question of the right to make the defense of want of consideration at law, the settlement must be made.

If such settlement cannot be made at law the defense cannot be made at law.

The assumptions determine the question.

These assumptions we dispute.

The necessity for a settlement, as the basis of the defense, of the right to plead, or to prove a want of consideration, we deny.

THE LAW, AS INDICATED BY JUDGE MCCRARY, IN THE QUESTION WITH WHICH HE BEGINS THE CONSIDERATION OF THE THIRD DEFENSE.

The general proposition, as stated above, in the question asked by Judge MCCRARY, with the assumptions made by him as the basis of his answer, are neither lucid nor distinct.

We may have erred in considering his statement as assuming that in this case the determination of the question, of the right to make the defense at law, depended upon a settlement of the affairs of the partnership.

It may be that he intended to assume only—

That the fact that Winston had no interest in the assets sold by him, could be proved only by such a settlement; or

That he intended to say that the interest which Winston had in such assets, at the time of his sale of such interest, depended on such settlement; or

That evidence could not be procured at law to prove that Winston had no interest in the assets sold by him at the time of such sale, but that a defendant must go into equity for a settlement to procure such proof; or

That having such proof at law, he had not the right to use such proof at law, but must go into equity for a settlement, where alone he could make use of his proof.

As in criticising the reasons given in the opinion of Judge MCCRARY, we will consider these several proposition. We now content ourselves with the statement of them.

Having stated the issues made by the plea, and the evidence offered to sustain it, *as stated by Judge McCrary*, and his general ruling on the law, we will now state the *true issues as* presented by the plea, and the evidence offered to sustain it.

REAL ISSUES.

The true issues, then, are:

1st. To an action at law on a note *the consideration* of which was the *sale by a partner* of *his interest* in assets of a firm of which he was a member, is the plea of want of consideration a valid defense?

2d. Is evidence *sufficient to prove* that at the time of such sale the vendor and payee of such note had already received more than

his full share of the partnership assets, *competent* evidence at law to sustain such defense?

3d. To make such defense, is the defendant compelled to go into equity to have a settlement of such partnership?

It will be seen that the decision is based rather on the incompetency of the court of law than on the incompetency of the evidence; though the evidence is excluded as incompetent; error is assigned as to both.

As the effect of the ruling of the Court was to deny the right to make the defense at law in this case, and to exclude all the evidence offered to sustain this defense, as *incompetent and irrelevant*, we will now consider the reasons given by Judge McCrary for his decision.

THE REASONS FOR HIS RULING, AS GIVEN BY JUDGE MCCRARY.

1. Question not an open one, concluded by the decision of Justice MILLER.

By reference to the opinion of Judge McCrary, p.36 of record, it will be seen that he holds that the question before him is not "an open question"; but that he is concluded by a decision of Justice MILLER, and to show that he is thus concluded, he makes two citations from the opinion of Judge MILLER.

He says: "Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. *But it is not an open question.* It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this Court, setting forth substantially the *facts found in his answer* in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for the injunction resisted, at the last term of this Court. Upon full argument it was held by this Court that the *defense to the note, upon the facts stated in the bill*, should be made in equity."

He then proceeds:

"Mr. Justice MILLER, in delivering the opinion of the Court, said:

"As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity, without going to law, we have no question." And again, "the whole ques-

tion can, and ought to be, settled in a court of equity, and we have no hesitation in overruling the demurrer, as a *general demurrer.*"

This reference to the opinion of Justice MILLER, on the bill in equity, is not made to show that this question was adjudicated, and the defendant precluded, by the judgment, from making this defense; as it appears from the opinion of Judge MCCRARY that the bill was afterwards dismissed by the defendant, the complainant in the bill, who, as Judge MCCRARY says, "saw fit to make his defence at law."

This question might have been concluded by the determination of the rights of all the parties to the bill in equity, considered by Justice MILLER; the powers of a court of equity being, as he says, "broad enough to cover the whole case."

But those powers were not exercised. The bill was dismissed by the complainant, and the parties, thereby, are thrown back on the powers of the court of law. The plaintiff in error was thus left with his legal defenses alone, among others, this defense: want of consideration.

This defense was in no manner impaired by the filing, nor by dismissing the bill.

The plaintiff in error may have made a mistake in abandoning his defense in equity, based on the facts stated in his second defense —may have thought that it would be unavailable, if he were compelled to make all the partners parties defendant, from inability to get service on them; may, after the bill was filed, have found evidence at law, ample to sustain his third defense, which was not included in the bill in equity; may well have feared that the other partners, when made parties defendant, would plead that he had acquired no interest in the assets by his purchase from Winston, as is claimed in fact by his defense, and hence had no right to a settlement.

Whatever the inducement, the dismissal of the bill in equity did not affect his right to make at law his legal defense of want of consideration. No such effect is claimed by Judge MCCRARY. His reference to the action of plaintiff in error touching the bill in equity is only to give the weight of the then opinion of plaintiff in error, to the argument made by the Judge to sustain his ruling of the law.

We claim that Judge MCCRARY misunderstood the bill in equity, the action of the plaintiff in error and the opinion and ruling of Justice Miller thereon.

his full share of the partnership assets, *competent* evidence at law to sustain such defense?

3d. To make such defense, is the defendant compelled to go into equity to have a settlement of such partnership?

It will be seen that the decision is based rather on the incompetency of the court of law than on the incompetency of the evidence; though the evidence is excluded as incompetent; error is assigned as to both.

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We claim that Judge MCCRARY misunderstood the bill in equity, the action of the plaintiff in error and the opinion and ruling of Justice Miller thereon.

To show how entirely he errs, both as to the facts contained in the bill in equity considered by Judge Miller, and the law as declared by him, we give the opinion of Judge Miller in full.

The facts on which it is based and which were contained in the bill, are fully set forth in this opinion, and, as will be seen, *are substantially the facts set out in the second defense*, and have *no relation to the third defense*, the want of consideration.

Opinion of Judge Miller.

"In the case of the bill filed yesterday morning by James N. Burnes against Milton Courtright, to which a demurrer was filed and argued, we will proceed to dispose of that, as the question of trial by jury is dependent on it.

And we are of opinion that a court of equity is the proper place to settle the matter in controversy.

The bill shows, and the statement of the bill will be taken as true upon demurrer, that Mr. Burnes was acting in the matter, in which he gave the note, which is the subject of the suit, not as the representative of his own interest merely, but as trustee for parties owning larger interests than his own, and larger than Mr. Winston's and larger than Mr. Courtright's in the aggregate.

It is very clear from the statements of the bill, that Mr. Burnes did not give the note on account of anything that he got for it personally. All that he has had, all that could stand as consideration for that note, was $40,000 of bonds of the Atchison Branch of the Southwestern Railroad. In these bonds, when he received them, Mr. Burnes had a very small personal interest, and it was not on that account that the bonds were delivered to him. The bonds were delivered to him as the successor of Mr. Winston, as trustee for the parties interested. It was the transfer of the trust from Winston to Burnes, that caused the transfer of the bonds. What obligation was there upon Mr. Burnes, to give his personal note for nearly $8,000 in that transaction? The bill says it was not intended to be such personal obligation; that it was not intended to be demanded of him, until some adjustment had been made of the interest of all these parties in those bonds, in the transaction.

Now to put all these doubtful questions of accounts between these parties, one of them having a two-fifth interest, and another one-fifth in trust for the East Leavenworth Company, for Mr. Burnes says he

had a one-fifth interest in trust for this company, when there was two-fifths held by Burnes, and probably Aller and Campbell and Winston ; to put all that to a jury, in that confused way, is not the way to settle these things.

Besides all that, if the averments of the bill be true, there is a necessity for an accounting of that partnership, of their interest in the contract, which the bill says remains unsettled to this day.

The only difficulty we have about the bill is, that in its essential nature, it ought to be, it must be, a bill to settle up all the matters between these persons interested, and they ought to be made parties to this bill. At my suggestion yesterday, Mr. Winston, who had been put in and then stricken out, was continued as a party. The bill goes on to say that in some way Mr. Aller and Campbell were interested in the partnership, and there is an implication in the bill somewhere that Aller and Campbell were out of it. In this branch of the bill there ought to be a clearer intimation of the state of the interest of Aller and Campbell in the partnership. If they have parted with their interest, it ought to be stated ; and if they hove an interest in the settlement, it should be stated ; for there must be a settlement of the contract, to ascertain whether Mr. Burnes ought to pay anything on that note. Whether he ought to pay anything on that note, depends upon whether Winston is entitled to anything ; whether he is entitled to anything, depends upon a settlement of of the affairs of the concern. And each ought, if possible, be brought into this Court, and all the parties having an interest in that fund ought to be made parties in this bill. Whether they will come in voluntarily, and answer, and if they do not, whether you can go on without them, or whether you should advertise, and give printed notice under the Act of Congress concerning such matters, I am not prepared just now to say. Certainly, though, it is necessary that the plaintiff make an effort to bring all the parties into Court and settle up the whole transaction, and ascertain whether there are any funds to go to pay that note left in the hands of the plaintiff by Mr. Winston growing out of this contract.

As to the general fact that equity has jurisdiction of the case, and that the transaction ought to be settled in equity without going to law, we have no question. In addition to the fact that the business is complicated by accounts, one of the main heads of equity jurisdiction is for the settlement of trusts, and Mr. Burnes, in these transactions, was acting as trustee. As a general proposition, there is no question about jurisdiction of the Court to settle this case ;

and, not only that, but the objection that parties have here to try some equitable defense, and that the law defense remains to be decided, we do not think is valid. This question when once settled in equity, covers the whole case. Mr. Courtright would have no difficulty, by filing a cross-bill, asking for a decree for any funds found in Mr. Burnes' hands payable on that note. The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer.

" I think the plaintiff ought to amend his his bill concerning the condition of Aller and Campbell."

It is apparent from this that the bill in equity was based, and the opinion of Judge MILLER given alone, on the second defense.

MISCONCEPTION BY JUDGE MCCRARY OF THE OPINION OF JUSTICE MILLER BOTH AS TO LAW AND FACT.

As has been seen, in referring to the bill in equity presented by the plaintiff in error, and considered by Justice MILLER, Judge MCCRARY says (p. 36 of Transcript) :

" It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this Court, setting forth *substantially the facts found in his answer in this case.*"

It will be observed that he does not say that the facts set forth in the *bill* were substantially the *facts offered in evidence* in this case.

But says only " that the facts set forth in the *bill* were substantially the facts found in the *answer* in this case."

As *these* facts were the facts found in the *second defense*, and no facts, but a simple denial of consideration are found in the third defense, it is clear that Judge MCCRARY confounds these defenses, and so applies the decision of Judge MILLER to the third defense—to the defense of want of consideration.

This defense was not made in the bill in equity, and was not considered by Judge MILLER.

On the contrary, the theory of the bill in equity, based on the facts therein stated, was in contradiction of the third defense.

The second defense denied that the instrument sued on was a note ; averred that it was only a memorandum of the estimate of the value of the interest, which Winston was supposed to have in certain assets of the partnership of which he and Burnes were

members; that such *interest* was not *transferred* to Burnes, but the bonds were *turned over* to Burnes, *as trustee of all the partners, Winston included:* the interest which Winston was supposed to have in the bonds to be accounted for at the estimate on a settlement of the partnership affairs.

THE BILL THUS

1st. Admitted an interest in Winston, in these bonds and in the partnership.

2d. It admitted the necessity of a settlement, not for the mere purpose of ascertaining whether he had or had not an interest, but for the purpose of enabling him to recover his interest.

3d. It charged, that as to such bonds they were delivered to Burnes *as trustee for all the partners*, to be held by him as such until a settlement of the affairs of the partnership could be had, the interest of each partner could be ascertained, and Burnes could be discharged of his trust by handing over to each, including Winston, his share.

The assignment of the note is assumed to have transferred to Courtright, the deceased plaintiff below, the interest of Winston in these bonds.

On these facts, as set out in the bill, Judge MILLER held that equity was the proper tribunal for the determination of all these questions, and the administration of this trust.

Judge MILLER shows, too, how Courtright will recover the interest assigned to him by the assignment of the note then called memorandum.

He will not recover against Burnes, as debtor, *on a note*, but against the partnership, and perhaps *against Burnes, as trustee*, the amount to which Winston may, on a settlement, appear to be entitled to as his interest in the bonds.

None of these facts could appear; no such judgment could be rendered on the 3d defense.

This defense denies all interest in Winston; sets up no character of trustee in Burnes; could be no basis for any decree against the partners, for any share of Winston, in favor of Burnes as trustee, or Courtright as assignee.

All the material facts stated in the *bill* are substantially stated in the *2d defense.*

None of such facts are to be found in the 3d defense.
None of such facts were offered to be proved.

The opinion of Judge MILLER relates exclusively to the facts stated in the *bill*, to the facts substantially set up in the *2d defense.*

It has no reference to the *3d defense.*

By confounding these two defenses, Judge MCCRARY does injustice to Justice MILLER, and falls into the grave error of assuming that the question presented in this case, of the right to make the 3d defense at law, had been decided by Judge MILLER; and that he was concluded by such decision.

THE QUESTION IS OPEN.

So far as this question is affected by the opinion of Judge MILLER it is not only left open, but is not even alluded to.

It was not before him.

CONFUSION OF 2D AND 3D DEFENSES, BY JUDGE MCCRARY, AS TO THE EVIDENCE.

It has already been shown that Judge MCCRARY confounds the 2d and 3d defenses, and so applies the decision of Judge MILLER, as to the 2d, to the 3d defense in the answer.

We have shown his error, in saying, that the facts set up in the bill were substantially those found in the 3d defense by his confusion of these defenses.

It has been noted, that he does not say that the *facts offered in support of the 3d defense*, and to show want of consideration, were the same as those set forth in the *bill*, but that the facts set forth in the *bill* were to be found in the *answer.*

We have thus seen his confusion of the two defenses.

We will now submit, that if defendant below had given evidence of facts such as are made the basis of the defense in the *bill*, he *would have defeated his plea.*

The very foundation of the bill in equity is the *admission of an interest of Winston in the assets.* Evidence to show such interest would defeat the 3d defense, which is based on a denial of such interest.

Such evidence, if offered by defendant below, would not need to be excluded as incompetent or immaterial.

If admitted it would have disproved the third defense, which is based on the want of such interest.

It would have shown plaintiff entitled to recover.

The defendant committed no such error, made no such confusion of his defenses.

This confusion of these defenses by Judge McCrary is shown again in the conclusion of his opinion, p. 36 of record.

He says: "I have, in considering the defense of want of consideration, assumed that the note sued on was given by the defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs and *not to be a charge against the defendant personally.*"

The matters here last named have no reference to or connection with the question of want of consideration, but relate to the second defense and the bill in equity based thereon. Yet he refers to them in connection with the third defense.

Judge McCrary shows even a more extraordinary misapprehension of the facts and pleadings in the very conclusion of his opinion, when he says of the evidence above referred to:

"The testimony upon the question is quite conflicting, and it is not necessary to decide it."

Why not necessary?

"Because, in any view of the case, the plaintiff has the right to recover at law upon the note, whether it was executed *to* Winston to *hold in trust for others* or for his own use and benefit."

Here we have confusion confounded!

Not only has the Judge confused the pleadings and the evidence, but here he introduces a new question not referred to in either! *Winston* is nowhere referred to as *trustee* for any one! Having shown that the question is open, having exposed the confusion of pleadings and evidence into which Judge McCrary fell, let us now examine the

Reasons of Judge McCrary.

1. We have, perhaps, already considered his first reason, viz.: that he deemed himself concluded by the opinion of Judge Miller. We have shown his error in construing the opinion of Judge Miller, as applying to the question of the defense of want of consideration presented by the third defense, when it had no reference to such

defense, but was based on facts substantially set forth in the second defense, and which presented a theory distinct from and contradictory of the third defense.

We have shown that this error in the construction of the opinion of Judge MILLER and its effect as concluding his opinion as to the the third defense originated in the confounding of these two defenses by Judge MCCRARY.

So far as the opinion of Judge MILLER goes as to this question, Judge MCCRARY is untrammelled; the question is open; he cannot even find help in the opinion of Judge MILLER.

2. Though perhaps not in strict order of announcement, or ordinarily a *reason* for the decision, unless it be on the theory of *reasonable doubt*, I will here present the *doubt* expressed in the opinion of Judge MCCRARY as to whether want of consideration can be shown at all as against such a note, in law or equity.

DOUBT AS TO VALIDITY OF DEFENSE TO SUCH A NOTE.

He says: "Want of consideration for the note, *if it can be shown at all*"—thus showing that he doubted whether to such a note the want of consideration could be shown as a defense at law or in equity.

What is there in the transaction, or in the parties to it, which exempts this note from the law, which applies in all such transactions, between all other parties, as against all other vendors, who sell property, in which they have no interest, and in favor of purchasers who get nothing by their purchase?

Is there any special privilege given by the law, or protected by the ermine of Justice, which entitles a partner to perpetrate a fraud, for which one not occupying the privileged position of a member of a partnership would be punished?

Such a proposition will not be considered by this Court, and should not be seriously discussed.

It is yet gravely stated by Judge MCCRARY.

More than this, he has suggested an ingenious device by which such a fraud may be successful.

He says that a court of law is not competent to prevent such fraud or to protect the victim.

That, if there be any defense, which he deems doubtful, it is only in equity.

And the only means for making the defense is by a settlement in equity of the affairs of the partnership of which the fraudulent vendor was a member.

This settlement, as we will show, the victim cannot have.

The fraud is thus successful.

Assumptions as Reasons.

Assumptions can hardly be considered as reasons.

As, however, such *assumptions* are, with one or two exceptions, the only *reasons* given for the opinion of Judge McCrary, we now proceed to consider these.

The first in order is in the nature of a question, and has already been criticised.

We restate it.

"Ordinarily the defense of want of consideration may be made at law, but," asks the Judge, "is such the case, when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the Court?"

We have called attention to the variety of constructions which may be given to this question and the assumption on which it is based.

We have shown that one of these constructions which seems to hold that a settlement is necessary to the determination of the questions in issue in this case would, in effect, be a summary determination of the case—no settlement being, as he says, to be had in this case.

But we may have erred in this construction, as Judge McCrary does not seem to attribute such conclusive effect to his assumption.

What then is intended by the declaration "that the determination of the question of consideration *depends upon* the settlement of the affairs of a partnership, some of the members of which are not before the Court"?

What is meant by "*the determination of the question of consideration*"?

Is it the question of fact that Winston had or had not an interest in the property sold at the time of the sale, which "depends upon the settlement"?

If this be the proposition, we take issue and say :

That whether a partner at a certain time had or had not any interest in the assets of the partnership, can in no sense be said to *depend* on a settlement of the partnership affairs, and with less propriety when, as in this case, the assets represented the *profits* of the partnership.

His *interest, if any*, at the time of the sale, *depended on his acts then done, on what he had already received, on acts which would become the basis of a settlement*, should one be made, acts of which a settlement would be a mere record, and not on a settlement which might never be made.

A settlement seems, in the opinion of the Judge, to have a singular force and effect.

A settlement gives to the partners no interest in the assets. At most it is, even as between them, a mere *ascertainment* of the portion of the undivided assets to which they are respectively entitled.

Instead of their *interests* depending on the settlement, the *settlement* should be said to *depend* on the *interest shown* to *belong to the partners respectively* by *reason of the amounts already received* by *such partners* and *on which the settlement is made.*

The " determination of the question of consideration " then, if it be the determination of the question of fact, the question, whether the partner at the time of the sale by him of his interest in certain assets of the firm, had or had not *any* interest in such assets, does not depend upon a settlement to be made, but upon acts and facts already done, of which a settlement would simply be a record, but which would, for the purpose of making such settlement, have to be proved by other evidence.

The *settlement* is, in truth, but a *conclusion* from such *proof*, drawn by the partners, when made by them ; by the Court, if made by the Court.

In neither case does *the interest of a partner depend on the settlement*, but *on the facts proved*, as the basis of the settlement.

Each partner must *prove* his interest. His interest *depends* on such *proof.*

The settlement is a mere statement of the result of such proof.

The question then whether a partner has, or has not, an interest, in the assets, does not *depend* on the *settlement*, but on the *facts proved on such settlement*—facts pre-existent thereto.

On *these facts* the interest of a partner depends ; and such in-

terest is vested, and certain, before, as after settlement, and even though no settlement ever be made.

This case furnishes a striking illustration of the absurd legal consequences which would result from the assumption, that the interest of a partner depends on a settlement.

The sale by the partner, of his interest in the assets, was made in October, 1872. The trial was had in January, 1882, and no settlement had to that date.

The business of the partnership had been completed, and nothing left to be done, but the division of the profits then undivided, at the date of the sale by Winston, of his share of a portion of the profits.

Could there be a greater legal absurdity than to say that a partner could not show that he had an interest in such profits until a settlement should be had; a settlement, that I can say, has not yet been had?

How much more absurd to say, that a purchaser of an interest in such profits, who got nothing by his purchase, should not have the right to show that his vendor, one of the partners, had no interest in the assets sold by him?

Burnes and Winston being partners in the firm to which the assets belonged, does not affect the question. As to this transaction they are strangers to each other, and Burnes a stranger to the partnership.

Though, in the proposition under consideration, Judge McCrary does not refer to the fact that Burnes and Winston were members of the firm, to which the assets belonged, yet as he refers to this in his statement of the evidence offered on the trial, and excluded, as before stated it may be, that his opinion was influenced by this fact.

We have then to say that this fact cannot affect the determinatian of this question.

As to the sale by Winston, to Burnes, of the assumed interest of Winston in the bonds, the fact that they were both members of the firm to which the bonds belonged does not affect their relation to each other, or to the firm, as to such sale.

As to such sale, they are to be deemed as strangers to each other, and Burnes, at least, as a stranger to the partnership.

There is no question made here growing out of their relation of partners; no question of any notice by reason of such relation; they are simply in the relation of vendor and purchaser.

If then, a stranger, as purchaser, is entitled to make this defense, Burnes is entitled to make it as fully with all the rights of a stranger both as to Winston and the firm.

Judge McCrary does not give this as a reason for his opinion, unless it be by insinuation, as such it may need a reply.

Having, as we hope, shown the error of the Court in its assumption "that the determination of the question of consideration" *depends* on any settlement if by such expression it is intended to declare that the interest of Winston in the bonds sold by him, which was the consideration of the note, depended on a settlement, we will consider what is meant by the further statement, as to what is to be settled and who must be parties to such settlement.

The Settlement and the Parties Thereto.

The assumption as to the question of consideration, says it "depends on the settlement of the affairs of a partnership, some of the members of which are not before the Court."

We have naturally inquired whether this admitted the competency of the Court as depending on the presence of all the members of the partnership, and if so, would a court of law be competent if all the members of the partnership were made parties? Such would seem the logical inference. As, however, logic must yield to assumption, we have felt compelled to admit that the power of a court of law to "supervise such settlement" is denied by Judge McCrary.

What then shall be the extent of such settlement?

"The affairs of the partnership." The affairs of the partnership as between the partnership and strangers alone or as between the partnership and the several partners also?

Why should it embrace a settlement of the affairs of any other partner than Winston? Why is it necessary to ascertain their shares? The interest of Winston may not, most usually would not, be affected by any ascertainment of their shares. His share would not be dependent on theirs; their shares might have been all sold, and his would not be affected.

For a like reason, we ask why is it necessary for the purpose of ascertaining whether Winston had an interest in such assets, that "all the members" of the partnership, should be parties to the settlement?

The other members have no interest in the question; no claim is made againt them; they may not desire a settlement.

The question becomes of more grave importance, when as in this case it is held that the settlement is to be made by a court of equity.

The Settlement to be Made by a Court of Equity.

It is submitted that Judge McCrary erred again in holding "that the defendant must resort to a court of equity for relief," and "that want of consideration for the note, if it can be shown at all, can only be shown upon a settlement of the partnership affairs in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement."

This is a condensation of his assumptions, the conclusion therefrom, and to some extent relieves us from the further effort to ascertain the meaning of this assumption on which he bases his conclusion.

The Conclusion of Law as Announced in the Opinion.

Let us analyze this proposition: 1. The defendant must resort to a court of equity for relief.

What relief does defendant ask for? What relief does he need?

He asks no relief, unless it be the right to give the evidence, which he offers, and which, for the determination of the question before this Court, is admitted to be *sufficient* to sustain his defense; evidence, to prove that Winston had already received more than his share of the assets, and so show that he had no interest in such assets, and thus sustain this defense of want of consideration of the note given for such interest.

He does not need the aid of equity to procure such evidence. *He has it before the Court.* He offers to introduce it. Its *sufficiency to establish the defense is admitted* in both the exceptions and in the opinion of the Court.

The admission of this evidence, is all the relief the defendant needs.

Can a court of equity give this relief?

Can it compel or authorize the court of law to receive this evidence?

There is no other relief consistent with the real issues presented by the defense and the evidence offered to sustain it, which can be conceived.

The Court below, in its opinion, seemed, as already suggested, to have strange views of the purpose and character of a settlement; and it may be that a settlement is looked to, as the only means by

which competent evidence, to show want of consideration, can be provided.

As it holds a court of law incompetent to supervise such settlement, a court of equity must be called on to "supervise such settlements," and thus furnish the defendant with evidence to sustain his defense, with proof of the facts, which will show a want of consideration.

Let us see if such be the intent or effect of a settlement in equity, if a settlement can be had in equity for such purpose.

A Settlement in Equity to Make Proof of a Legal Defense.

The ordinary purpose of a settlement in chancery is not merely to take an account of the condition of a partnership, and of the shares to which the parties respectively are entitled.

A bill for such purpose alone would not be entertained by a Chancellor. He cannot be used, simply as an expert, to balance the books of a partnership when appealed to for the exercise of his ample powers, the aid asked for must be of more importance than the mere taking an account, to ascertain the share of one or more of the partners.

That is not what is meant by a settlement.

A settlement in equity means not only the taking an account of the business of the partnership, but a dissolution of the partnership, and a decree for the share of each of the partners.

This is its most limited meaning.

It may be extended to decrees against the firm, and a member, for the delivery to a stranger who has become a purchaser thereof of the share of a member in all or a portion of the assets of the firm.

Such would be the action of the Chancellor in this case if the defendant could go into chancery, claiming an interest in the assets by the sale by Winston of his share thereof.

No such share is claimed by the pleadings; on the contrary, the defense denies such interest, and the evidence offered would prove that defendant had no interest.

The only bill he could present would allege that he had no interest; that the sale by Winston conveyed no interest: the only aid that he could ask in such bill would be that an account be taken, the books of the firm balanced, that he may have competent evidence to show want of consideration and sustain his defense at law.

This is to reverse another ordinary rule in favor of this extraordinary case.

The ordinary rule is, that the Chancellor shall send to the law Court, as better fitted for such inquiry, facts of difficult investigation. Under this new rule, for the benefit of a partner who seeks to practice a fraud, the law Court, as not competent to lend its aid, must call on the Chancellor as an expert for the exertion of his extraordinary powers, that he may extort from witnesses evidence which the law Court with its limited power is deemed not competent to elicit, to protect if possible the fraudulent partner.

That our argument does no injustice to the lower Court we will now refer to the extraordinary reason given by Judge McCrary for holding that defendant must go into equity for a settlement and make all the partners parties.

The only Reason for going into Equity and making all the Partners Parties.

The only reason considered logically which is given by Judge McCrary for his ruling that defendant must have a settlement in equity is to be found in another extraordinary statement.

Referring to the testimony offered by defendant, p. 36 of record, he says:

"It is argued that *the evidence before the Court in this case shows* that upon such settlement it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership who are not here would not be able, if brought into a court of equity, to make other and further proof.

"I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity were afforded him."

The Judge here admits that "the evidence before the Court," that offered by defendant below, "would show that Winston had no interest in the bonds for which the note was given." And then excludes the evidence on the possibility that Winston or the other partners, "if brought into a court of equity, migth be able to prove that Winston had an interest in such bonds."

On this possibility he rejects the evidence offered by defendant, which he admits is sufficient to establish the defense of want of

consideration and to prove that Winston had no interest in the bonds.

And holds that defendant must go into equity and bring all the partners into such Court as parties, because, as he says:

"I cannot assume that the other members of the partnership *who are not here* would not be able, if brought into a court of equity, to make other and further proof."

Why were they not there?

The defendant in error, plaintiff below, had the right to have them there, either as witnesses or by deposition. The law Court was competent to compel them to be there and to testify.

Why was it necessary to make them defendants to a bill in equity, to enable them, or as he says of Winston, "*to give them an opportunity* to prove that he had an interest in the bonds"?

Could they not have the opportunity by appearing as witnesses in the Court of Law?

Could they not give the same evidence in a court of law as they could give in a court of equity?

This statement of Judge McCrary, is the more strange, as it is shown that three—the principal partners—of the five partners, the plaintiff and defendant as parties, and Winston as a witness, were in fact *all there.*

We ask, why should the defendant below, plaintiff in error, be compelled to go into equity for the possible end of procuring testimony of Winston or others, to contradict the evidence which he had "before the Court," and to disprove his defense? This would be no relief to him, for which he should seek the aid of equity. He did not need, or ask such aid.

The plaintiff below did need such aid, and he, if either, should have called on equity for aid. He did not ask for such aid.

The Court alone, in his behalf, decides that the aid of equity shall be called for.

We object to his compelling the defendant below to call on equity, to aid the plaintiff below, by procuring evidence to defeat the defense.

Why should Winston and the other partners be made parties to a bill in equity for a settlement?

In the extract above given from the opinion of Judge McCrary, is to be found the only reason given by him for making the partners parties to a bill in equity for a settlement, "that they may have

opportunity to and may possibly be able to give evidence to defeat the defense."

It seems, indeed, as if the procurement of this evidence, by making the partners parties, were one of the chief reasons for his requiring such bill and settlement, as he seems to hold that they could only give such testimony, or as he says, could only "have an opportunity to give such evidence on a settlement" and when "brought into a court of equity."

We have already criticised this reason.

We now ask, can any other reason be given, if such a settlement as could alone be made on the issues in this case were sought, why the partners in this partnership, other than Winston, should be made parties?

The assumption that a settlement of affairs of the partnership in a court of equity is needed, is not necessarily a reason for making all the partners parties.

While it may be that ordinarily all the partners must be parties to a bill for a settlement of the affairs of the partnership, this is not because they are partners, but by reason of that other universal rule, that those, and *those alone*, who claim or have an interest in the settlement, in the subject matter to be litigated and in its adjudication, are to be made parties to a bill in equity. Such interest must be alleged and shown, as the very foundation of the right to file the bill, and of the right to compel others to appear and defend the same.

Tested by this rule, and not by the mere fact that others than Winston are partners, why should such others be made parties to the bill?

As before said, as it is claimed, that this settlement is to be made by a court of equity, if it be the ordinary settlement in equity, a dissolution of the partnership and a distribution of the partnership property would be decreed, and so great injury may be done the other partners.

They may not desire a dissolution.

If the business of the partnership be not finished, as would have been the case, had the sale by Winston of part of his share been made *before the completion of the road*, the construction of which was the sole business of the partnership, it can be seen how the partners would have been injured by a dissolution.

If Winston, as shown in this case, had received more than would be his share on the completion of the road, and if at the time of such dissolution the work on such road were not completed, the other

partners might sustain injury in the loss of the services of Winston, the most efficient partner, and who had entire charge of the work. Such services might be the only means to which the other partners could look for compensation for the excess over his share already taken by him.

We might multiply instances of injury which might be done to the other partners by a settlement, and its ordinary result a dissolution of the partnership and distribution of its property.

If even the business of the firm were completed, and there remained nothing to be done but to take an account and divide the undivided assets, a settlement in chancery, with its attendant expense, might do great injury to the other partners.

They might well say that they had no need for, no desire for the aid of equity in making the settlement. That they were competent, without expense to make it.

But Judge McCrary holds that such a settlement will not serve the purposes of this case.

A settlement *in equity* must be had that Winston and the other partners may have an "opportunity to make other and further proof" to defeat the defense. Such proof, he holds, could not be made at law, and with even less right could it be made in a settlement by the partners, without going into a court of equity.

The purpose of this settlement is not, then, the ordinary purpose of a settlement in equity, but is simply to give the partners an opportunity to testify, and for this purpose they are to be made parties; to be subjected to injury and expense!

Here it may be well to refer to another matter which, in the confusion of the Judge, may have misled him as to the evidence offered by the plaintiff in error.

From the statement in the opinion it would seem as if the Judge understood the plaintiff in error as offering to prove as a fact that "it would *appear on a settlement* that Winston had no interest in the bonds."

No such proof was offered, nor could such testimony be given.

A witness could not testify as to what would appear on a settlement to be made.

Nor could a witness testify *as to a fact* that Winston had no interest in the bonds.

Whether Winston had or had not an interest is not a fact, but a question of law, to be determined by the Court on facts proved by witnesses.

Witnesses prove facts, and not conclusions of law.

Such conclusion would "appear on a settlement," not as a fact, but as the result of the facts proved on the settlement, pre-existent to and independent of the settlement.

The statement, then, as to this conclusion that "it would appear on a settlement" did not mean that any such fact was offered in evidence, nor did it make any settlement necessary.

We have now considered all the reasons given by the Court to show that a settlement of the affairs of the partnership is necessary to enable the plaintiff in error to make his defense.

We have seen that the special, if not, indeed, the only, reason relied on, is that Winston and the other partners may have an opportunity to testify, and that this is the reason for holding that the settlement must be made in a court of equity.

We have shown that this is no valid reason, as such opportunity to testify was given in the court of law.

On the assumption, however, of the need of such settlement, the Court holds that "a court of law is not competent to supervise such settlement," and hence concludes that it must be made in a court of equity.

We have already considered the question of the necessity of a settlement to entitle or to enable the plaintiff in error to make his defense.

We will now consider the proposition made by the Court, that a court of law is not competent to supervise a settlement of the affairs of a partnership.

A Court of Law is Competent to Supervise a Settlement of a Partnership.

The Court, in its use of the term "settlement," intends, we may assume in this case, to mean what is termed in the books "account," and in even a more limited sense than the most limited sense of the term "account"—the purpose of the settlement in this case being alone to procure the testimony of the partners.

As we have seen, the only question is, Had Winston any interest in the bonds at the time of the sale? To determine this question is the only purpose for which the plaintiff in error could ask of equity a settlement.

If the proof of the facts on which this interest depends, and on which the account would be taken, if one were needed, be all that

is to be passed on by the Court, why is not a court of law competent to pass on the testimony?

We may admit that the taking an account of the affairs of a partnership may in many cases at law or in equity be *inconvenient*, but *inconvenience* alone is no reason why one court shall be held less competent than the other; why the labor of the investigation shall be transferred from one to the other.

Courts of law are accustomed to the labor of investigating accounts, and the old action of account was in common use even before the grand system of equity was devised.

The legislation of late days, since the same person is usually clothed with the double character of Judge and Chancellor, has generally recognized both the competency and fitness of the person in the one capacity as in the other, to take an account or to supervise a settlement.

Courts of law now have generally all the powers of courts of equity.

But, we ask, where is the difficulty, even the inconvenience, that would attend the investigation of the affairs of the partnership, which would be necessary to the determination of the question presented in this case, even though it involve a settlement of such affairs, as far as would be necessary for such determination?

At most, it could involve only the taking such an account as would show whether, at the time of the sale, Winston had already received more than his share.

Even if it involved a settlement of all the affairs of the partnership, as between Winston and the firm, it might have been, and I can say in this case would have been, simple and readily made.

It is shown that the partnership was confined to a single contract—the construction of a short branch of a railroad. At the time the note was given the road was completed; the business of the partnership ended, and nothing was to be done but to divide the assets not already divided.

The share to which Winston was entitled of the whole was two-fifteenths.

As ascertained after the bill in equity was filed, Winston had at the date of the note received more than his share of the entire assets, more than two-fifteenths of all.

This fact was simple and easily proved.

Part of the evidence offered in fact was an account stated by Winston to Courtright, the plaintiff below, and, with Winston, a member of the firm; an account received and admitted by him.

This proved by itself alone the defense as pleaded.

It might have been shown by proof that Winston had prior to the sale to plaintiff in error already sold his interest.

That his interest had been sold under process of law.

That the assets had been sold by the firm.

Or sold under process at law against the firm.

By proof of admissions of Winston and Courtright.

Or by proof of any other acts on which the settlement would be made.

Why, then, was not a court of law competent to pass on such proof, the only proof which could be given in a court of equity, or as would be given on any other account?

A court of law is not only competent to receive proof of an account, but to balance accounts as between claim and defense, and even as between partners by the old action of account.

Why can it not, then, in this case, even if an account is to be taken, "supervise such account" as in other cases?

The only question to be determined in this case is the single fact, had Winston any interest in the assets—a question much easier to ascertain and determine than to determine the claims of the partners on an action for an accounting, or even to balance the claims of a plaintiff and defendant, each claiming on an account.

The third defense is not like the second defense, on which the bill in equity considered by Judge MILLER was based.

That defense and the bill in equity were based on the admission of an interest in Winston, on the allegation that the instrument was not a note, but a memorandum of such interest in bonds turned over by Winston to Burnes, to be held by Burnes as trustee for Winston and the other partners, the interest to be accounted to Winston on a settlement of the partnership.

No such equities can arise on the third defense.

That is a naked legal defense.

It admits the instrument, as held by the Court, to be at law a note, and says it is without consideration.

The proof is, that the consideration was the sale by Winston to Burnes of an interest in the bonds, and that he had no such interest to sell.

A Court of law is competent to entertain this defense, and to pass on this evidence.

Having considered all the reasons given by the Court for its decision, as this Court may hold that the judgment may be good how-

ever bad the reasons given for it; and in the possibility that Judge McCrary may be like a Judge of an early day in Missouri, of whom my late friend, a bright lawyer, Carty Wells, once said: "He could give better decisions and worse reasons for them than any Judge of his day." We will now consider the judgment, and see if it be good in despite of the bad reasons given for it.

For this purpose, and to prevent the confusion of the second and third defenses and to recall the true issues in this case presented by the third defense, and the question as to the competency of the Court of law to determine the question of consideration and of the admissibility at law of evidence to sustain the defense.

We restate the issues:

1st. The issue presented by the 3d defense as pleaded, is only and simply that there was no consideration for the note sued on.

2d. The only question presented by the evidence, admitted to be sufficient to sustain the defense and otherwise without objection, was, whether such defense could be made and such evidence given in a court of law; or, can such defense be made and evidence given to sustain it, only on a bill in equity, for a settlement of the affairs of the firm, to which the assets belonged, and the sale of the interest of one partner in which was the sole consideration of the note.

No right to, no claim for, the recovery of any portion of the assets is made in the pleadings.

No such claim for the recovery of any interest in the assets could be made on the evidence.

If any right to any portion of the assets sold was shown by the evidence, in the defendant below by the sale, the evidence would not need to be excluded; it would disprove the defense.

The statement made as to the evideuce offered, "that it would show that upon a settlement Winston would have had no interest in the" assets, is not a statement of fact offered to be shown, but is a mere statement of a result from the facts offered in evidence; the result of a settlement based on such evidence.

Facts which Make a Settlement in Equity Unnecessary.

Proof of a settlement made by the partners without the aid of a Court, would render a settlement in equity unnecessary, though by such proof no opportunity would be given to the partners to testify.

A Settlement can be Shown at Law.

Not only may a settlement of all the affairs of a partnership be proved at law, but a partial settlement of such affairs may be shown at law, and is the ordinary foundation of an action at law by one partner on the result of such settlement.

Proof of such settlement would render a settlement in equity unnecessary.

Such settlement may be proved *in effect* without proof of any settlement formally made.

A division, by agreement among the partners, of all the assets would be equivalent to a settlement.

An account rendered and not objected to is equivalent to a settlement.

Such proof as last mentioned was, in fact, part of the evidence offered in this case and rejected.

It was an implied admission of plaintiff below, to whom the account was rendered, and kept by him for many years without objection

Direct admissions of plaintiff would be competent at law to prove a settlement, or its equivalent in effect, and would render a settlement in equity unnecessary to this defense, though such admissions would give no opportunity to the other partners to testify.

Result of a Settlement can be Shown at Law.

Partnerships in these trading and speculating days are not only varied, but in perhaps most cases so simple, so limited in their operation, that in many instances they have no books, no accounts; seldom comparatively, affairs or accounts so complicated that a court of law is not competent to supervise or to pass on them; that the machinery and power of a court of equity must be appealed to.

They are most frequently limited to a single transaction, simple in its nature.

We will cite some of the vast number of daily speculations in bonds, in stocks, in grain, provisions, cotton, coal oil.

This last, the most slippery of all, in the *settlement* of which so many millions have been realized, which too plays, it is said, so important a part in the *settlement* of the *political affairs* of a great

State, if not of the nation, yet in the stock market is so easily handled that partnerships for the purchase of its stock are daily made, the results ascertained, settlements made without the aid of a court of equity, in many cases without even an account, and some times without a division of any profits.

In all these cases, and in others such as the purchase, or building of a house; the erection of a bridge, the construction of a road, the purchase of a horse, a bull, a boar or even a prize dog; the partnership may be simple as it is single, and often needs not the aid of a court of law or equity to settle its affairs, or as here to ascertain whether at a given time a partner had any interest in the assets.

Can it be, that in all these single, simple partnerships, if a partner sell his interest, and the purchaser find that he had no interest, had already received more than his share, such purchaser can make no defense to a note given for the purchase, without going into equity, for a settlement of the partnership?

Or, is this rule to be applied alone to this exceptional case?

Nothing is shown to make the question in this case more difficult than in the simplest of the cases in illustration.

Indeed, it appears that this partnership was for a single purpose, the construction of a short line of road.

The road was completed, and nothing left to be done but a division of the assets at the time of the sale and giving the note.

The question whether Winston had an interest in such assets, at such time, ought to have been a simple question and easy of solution.

Why should not the defendant in this case, as in any other, be permitted to show at law the result which would be shown on a settlement.

He has, as said by Judge McCrary, "the evidence in Court" to sustain his defense; the very evidence on which a settlement in equity would be made; on which the result of such settlement would depend.

Why may he not use such evidence, to show such result?

"What would appear on a settlement;" its result, its effect, its equivalent, may all be shown by evidence at law in many other ways.

WANT OF CONSIDERATION MAY BE PROVED AT LAW IN A CASE LIKE THIS, IN MANY WAYS, EVEN THOUGH NO SETTLEMENT BE MADE, BY PROOF THAT WINSTON HAD NO INTEREST IN THE BONDS.

It is admitted that a partner can sell his interest in specific assets, part of the assets of the firm.

If he could not, the defense of want of consideration would be established by the evidence that the consideration of the note was such a sale.

No question of need for a settlement in equity could arise on that evidence if he had *no right* to sell such interest.

This evidence was excluded, with the other evidence, on the assumption of the right to make such sale, and that proof that the partner had no interest in the assets sold could only be made on a settlement in a court of equity.

It is equally undisputed that the interest of the partner in these specific assets could be sold, under legal process, on execution against him.

It could be sold separately, or by a sale of his entire interest in the assets of the firm.

So, his interest in such assets could be sold by the firm, by a sale of such assets.

His interest in such assets would also be sold by a sale of such assets on legal process, by exacution against the firm.

His interest in such assets would too be lost by the bankruptcy of the firm or of himself.

All such facts can be proved at law, to show that he had no interest in the assets sold by him, and there is no need of the aid of equity or of a settlement in equity to make such proof.

If it be competent to prove that he had no interest in the assets sold by him by proof of any of the other acts above named as competent proof of such want of interest, without going into a court of chancery for such proof, can any reason be conceived why the proof of such want of interest was not competent in this case?

It cannot be claimed by Judge MCCRARY by holding that the proof to show the want of interest; that Winston had before such sale received more than his share, could only be obtained by going into chancery and having a settlement made by that Court, was seeking to give aid to the defendant in making his defense.

Unfortunately for this assumption, he avows his purpose to be,

not to aid the defense, but on the possibility that in chancery evidence might be obtained to defeat the defense.

But defendant had no need of the aid of chancery to procure evidence to sustain his defense.

As Judge McCrary says, his evidence was before the Court. It had not to travel the tedious route of a bill in equity; it was there "before the Court" sufficient to establish the defense.

It needed no stamp of competency from a court of equity; nor could such stamp be affixed if needed.

We have considered at as may seem, unnecessary length all the possible phases of the assumptions, assertions and apparent reasons made and given in the opinion of the Circuit Court for its decision. Our excuse is, the humble recognition of the fact, so often impressed on us, that Judges do not always see the questions involved in a case as the attorneys see them. Sometimes it is because of the defective or distorted vision of the attorneys; sometimes, as we think in this instance, in the confusion of the views presented to the Circuit Court; it may have been the fault of the attorneys of defendant below in not throwing proper light on the question. Hence we have deemed it our duty to present the question to this Court in all the lights which seemed to us fitted to make it clear beyond misconception.

We have endeavored to show the errors of the Court, by exposing the fallacy of the arguments made in its opinion, and by showing that there is nothing in this case to take it out of the ordinary rule as to the defense of want of consideration.

We have endeavored to show that apart from and in despite of the extraordinary reasons given by the Court, a court of law is competent to entertain the defense and pass on the evidence to sustain it in this as in other cases.

We now present a view of the question, which seems to us so simple and yet so conclusive, that we feel almost as if we had trespassed on the time of this Court by the discussion of the propositions already considered.

Plaintiff in Error cannot go into Equity for Relief.

On the defense as pleaded, and on the evidence offered to sustain it, the plaintiff in error *cannot go into equity for relief.*

As has been seen, the proposition as made in the opinion of the

Court, is not that defendant below must go into equity for relief simply, for such relief as he may need and be entitled to ask of a court of equity, but to the *specific relief* of a settlemen by a court of equity of the affairs of the partnership with all the partners as parties ; and for the purpose of affording the partners an opportunity to give other and further proof contradicting the defense.

We have already considered this proposition, and endeavored to show that no such relief was needed by the plaintiff in error to sustain his defense.

We now submit that plaintiff in error has no right to call on a court of equity for such a settlement.

No one who has no interest in a partnership or its assets, has any right to ask a court of equity to compel a settlement of the affairs of a partnership.

The one uniform rule common alike to law and equity is that only such as can show themselves interested in the subject matter of the litigation can go into a Court or ask for aid.

If such be not shewn in the action at law or bill in equity it will be dismissed.

What facts consistent with his defense, as made by his plea, as shown by the evidence offered by him, can the defendant set forth in a bill in equity to entitle him to compel all the partners to come into Court, and to ask the Court for a settlement of their partnership affairs ?

He must set forth the action at law, his defense thereto, and the facts which he can prove to sustain his defense.

Such statement would show that he had no interest in the partnership, its assets or its affairs. His evidence would prove such want of interest.

His only interest in such settlement is to obtain evidence to sustain his defense to the action at law, evidence to prove want of consideration of the note, and so to defeat a recovery thereon.

Courtright as plaintiff would have an equal and like interest in obtaining evidence to sustain his action; evidence to prove that there was a consideration for the note, so as to defeat the defense and recover on the note.

Were Courtright a *mere stranger*, and he is, as we have shown, to be deemed such, would it be pretended that he could maintain a bill in equity to compel the partners to settle their partnership affairs, to dissolve the partnership, to distribute its assets ?

Or that such stranger could maintain such bill, dissolve the part-

nership and distribute its assets for the sole purpose of obtaining evidence to defeat the evidence of defendant and sustain the action at law?

The defendant below, plaintiff in error, is, too, in this case, to be deemed a stranger to the partnership, and with no other rights than any other stranger.

The only interest the defendant, or the plaintiff below, has to this action is the so-called interest in the settlement, as a means of providing evidence to defeat or sustain the action on the note. This is neither a legal nor equitable interest as is necessary to maintain a bill in equity for a settlement.

It is not pretended that any such interest will sustain such a bill against strangers to the note, and to the litigation thereon, as is the case here.

Even could a bill be framed for the mere purpose of taking an account of the partnership affairs among the partners, such bill could not be maintained by a stranger to such partnership, and its assets. He would have no interest in such accounts unless, as we have said, an interest in the evidence which it might make touching the consideration of the note.

This is no interest at law or in equity in such settlement. The members of the partnership, as such, have no sort of interest in the defense of the note, and cannot be subjected to the cost and labor attending such settlement for the mere possible benefit of a stranger seeking evidence.

Subject to no liabilities on account of the partnership, claiming no interest in its assets, one, a mere stranger, can have no right to compel an account, an exhibit of the condition of its affairs.

The defendant below, plaintiff in error in this case, as to this question, is in the condition of a mere stranger.

He is, by his purchase, subject to no liability as partner; claims no interest in the assets, or the account to be taken of the condition of the partnership; and more than this has the proof in the Court of law, which could be given by a settlement, and is hence in no need of a settlement to obtain such proof; has proof without a settlement in equity, sufficient to sustain his defense.

On what ground could he then ask for relief which he did not need, for proof which he already had, as the foundation of such a bill?

We confess that we have been unable to frame a bill which on the defense set up in the answer, of want of consideration of the

note, and on the evidence offered to sustain the defense, could give plaintiff in error the right to go into equity for a settlement of the affairs of the partnership named.

It has seemed to us that the only bill consistent with the defense, and in accordance with the facts offered in evidence to sustain the defense, would show that plaintiff in error had no such interest as is necessary to entitle him to call on equity for relief, or to bring the partners into equity to answer to such bill, or to ask of the Court any relief that it could grant.

The Proposition of the Court Answers Itself.

The proposition that the defendant below, plaintiff in error, must go into equity for relief, answers itself.

The defense is that the note is without consideration.

The facts offered to be shown as evidence, it is admitted, sustained the defense.

We are not to be permitted to prove this defence at law, but must go into equity to make the defense.

To go into equity we must repudiate the defense;

Must allege in effect *that there was* a consideration for the note.

The evidence showing that the only consideration of the note was the sale of a partner's interest in certain bonds belonging to a partnership, and that the vendor had no interest in such bonds, and conveyed none to the defendant, thus showing that the defendant had no interest in such partnership or its assets; the bill must contradict this evidence, and aver that defendant had acquired and had an interest in such assets.

The bill, then, to enable a defendant to make his defense, must repudiate his defense and contradict his evidence which sustains the defense.

The reason most relied on in the opinion of Judge McCrary is stranger still.

We are not required to go into equity for evidence to sustain the defense, it being admitted that our evidence before the Court was sufficient for that purpose, but because, as he says, he "cannot assume that the other members of the partnership who are not here would not be able, if brought into a court of equity, to make other and further proof." "I cannot take it for granted that Winston

would be unable to show that he had an interest in said bonds, if the opportunity was afforded him."

The defendant in the action is then deprived of his right to, as he says, a "defense ordinarily made at law," and is forced into making an extraordinary defense in equity, not that he has not evidence sufficient to sustain his defense at law, but on the possibility that "if brought into a court of equity the other partners might be able to 'make other and further proof.'"

Not "other and further proof," in aid of doubtful proof given by defendant to sustain his defense, but, as he says of Winston, "that he may able to show that he had an interest in said bonds, if the opportunity was afforded him."

We must then go into equity not for aid in making the defense, but to give "Winston and the other partners" an opportunity to defeat the defense.

As will be seen, we have confined ourselves to the declaration of law made in the opinion of Judge McCrary, that to make his defense of want of consideration the plaintiff in error *must go into equity for relief:* not *for such relief as he might deem necessary, but for the specific relief of a settlement of the partnership affairs, with all the partners parties to the bill.* And for the reason that thus alone could such partners give evidence to prove that there was a consideration for the note.

We have not considered the question whether the plaintiff in error could have relief by a bill of discovery, or evidence to sustain his defense, the only other possible relief in equity.

Such a bill is not suggested by the Court as available in this case.

Nor is there in this case *one of the elements necessary* to entitle the plaintiff in error to such relief, nor on which a bill of discovery could be framed.

It could not be alleged that any evidence necessary to the defense is in the knowledge or under the control of Courtright, the only adverse party to the action, which needs the aid of equity to extort, by its power to compel the party to give evidence.

Nor could such a necessity arise in this case, a court of law having as full power te compel a party to the suit to testify or to produce evidence as a court of chancery.

A conclusive reason against the exercise of its power to compel a discovery is given by the Court in its reason for compelling plaintiff in error to go into equity.

The evidence to be discovered is not evidence in possession of a party to the suit, but the evidence of mere witnesses not parties.

Against such, a bill for a discovery will not lie.

Story, Eq. Pl., §§ 226, 311, 321, 323, 610.
Daniels, Ch. Pl. and Pr., 332–333.

Summing Up.

We now submit that we have shown that the Court erred,

1. In not dismissing the action on proof of the champertous agreement for its prosecution.

2. In excluding as evidence the copies of the books.

3. In excluding all the evidence to sustain the second defense.

4. In excluding all the evidence to sustain the third defense of want of consideration, and in its ruling that such defense could not be made at law, but could only be shown on a bill in equity for a settlement of the affairs of the partnership named by the Court.

5. And in refusing to declare the law, as asked by the plaintiff in error.

Want of Consideration.

We submit that as to the third defense—want of consideration—we have shown.

1st That the Court was not concluded by the opinion of Justice Miller.

That such opinion had no reference to the third defense; but related alone to the second defense.

2d. That the Court confunded these two defenses, both as to the effect of theopinion of Justice Miller, and as to the evidence offered by plaintiff in error.

3d. That a court of law was competent to entertain this defense, and to receive and pass on the evidence offered to sustain it.

4th. If a settlement of the partnership accounts were necessary to entitle plaintiff in error to prove that Winston had no interest in the property sold by him, a court of law was competent to supervise such settlement.

5th. That no settlement was necessary to enable plaintiff in error to make such proof, but such want of interest could be shown at law by proof of any one or more of many facts.

6th. Plaintiff offered to prove such fact, and had the proof "before the Court," admitted by the Court to be sufficient if received to prove the defense.

7th. A settlement in equity of the affairs of the partnership to which the assets belonged was not necessary to enable plaintiff in error to use his evidence and prove that Winston had no interest in such assets.

Such want of interest could be proved without any settlement.

8th. If a setlement of such partnership in a court of equity were necessary to enable plaintiff in error to make such defense, he is without defense.

9th. He cannot go into equity and ask such settlement.

10th. He has no interest in the partnership or its assets on which to ask a settlement in equity.

11th. He has no need of equity for any relief which equity can give

12th. He has no need of other evidence, having sufficient evidence before the Court.

He needs only that his evidence be received.

A court of equity cannot compel its reception by the court of law. This Court alone, and only as a court of law, can give this relief.

13th. He has no need of other evidence, and in this case cannot ask equity for a discovery.

He has no right to a discovery—the evidence which the Court holds he should have being only the evidence of witnesses.

14th. To go into equity as the Court holds he must to seek for evidence to defeat his defense, he must abandon his defense and repudiate his evidence.

15th. With no right to go into equity.

With no need to go into equity, needing no relief which equity can give.

With evidence sufficient to sustain his defense.

The Court says:

He must go into equity.

That in equity alone he can make his defense.

To sustain his defense he must abandon his defense.

Must repudiated the evidence to sustain his defense.

And seek in equity evidence to defeat his defense.

In a Court celestial, higher even than this, it is said to be well to plead guilty and throw one's self on the mercy of the Court.

But this is the first case *reported*, in a Court celestial, or terrestial, in which a plea of guilty has been deemed proof of innocence.

In which with proof of his innocence, to make his defense, one must abandon his plea—admit his guilt and search for evidence to disprove his innocence.

We now submit brief references to the law as to the questions which we have considered as affecting the defense of want of consideration, and which we deem conclusive in our favor and so well settled as to be elementary.

A settlement of a partnership or its result can be proved at law, and is an ordinary foundation for an action by one partner against another.

Lindley on Partnership, 967–1026–1037.

A partial settlement may be proved at law as the foundation of an action.

Ib.

An account stated may be at law the basis of an action or defense.

Lindley on Part., 967–968.

An account rendered and not objected to is equivalent to a settlement.

Lindley on Part.; 968.

One partner may sell his interest in all or part only of the assets. Such sale may be proved at law.

Ib., 698 and note.

Such sale may be made by legal process without the aid of equity.

29 Wend., 398, Phillips vs. Cook.
2 Hill, 47, Waddell vs. Cook.
Lind. on Part., 688–688.

As to such sales the rules of law apply until equity interferes to distribute the property.

Plaintiff can prove at law that he has a right to the property under sale.

With even more reason a purchaser may show that he got no interest by the sale.

This is the question here :

Action at law will lie between partners on a final balance on proof that no more outstanding demands can be collected.

11 Pick., 79, Williams vs. Henshaw.
12 Pick., 378, " "
6 Gray, 433, Sikes vs. Work.

Defendant may show that he has no interest in a partnership and so be not held to account.

33 Ga., 444, Pearce vs. Bruce.

When partnership property has been sold for individual debt the other partner can recover his interest at law without an account.

3 Denio, 125, Walsh vs. Adams.

Here is proof by a partner at law of his interest.

With more reason may a stranger at law prove that a partner has no interest.

Insolvency of a firm may be proved at law to show that a partner had no interest.

Lind. on Part., 789, and cases cited.

No accounting necessary before a sale of a partner's interest.

Lind. on Part., 690 and notes.

To an action for an account of partnership dealings an account already settled is a good defense.

Lind. on Part., 968, Sec. 3 and notes.

With more reason is such an account stated, evidence in favor of a stranger, that the partner stating the account had no interest.

Such, among other, was the evidence rejected in this case. An account stated rendered by Winston to Courtright, the plaintiff below, showing that both Winston and Courtright had before the execution of the note each received more than his share of the assets.

B. F. STRINGFELLOW,
For Plaintiff in Error.

117-582

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NO. 187.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1885.

JAMES N. BURNES,
Plaintiff in Error,

vs.

WILLIAM L. SCOTT AND JOSEPH McCARTER, EXECUTORS OF MILTON COURTRIGHT, DECEASED,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRAINARD & DECAMP.
Attorneys for Defendant in Error

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BRIEF OF ARGUMENT OF DEFENDANT IN ERROR, AND COUNTER STATEMENT OF THE CASE.

We dissent entirely from the statement of the case by the Plaintiff in Error; it differs from the true statement of the case in many essential particulars, and is misleading and unfair.

COUNTER STATEMENT OF THE CASE BY DEFENDANT IN ERROR.

This was an action brought by Milton Courtright. The Defendant in Error in this case on a Promissory Note, made by the Plaintiff in Error, James N. Burnes, to Frederick H. Winston, of which said note the following is a copy:

CHICAGO, October 10th, 1872.

Thirty days after date, I promise to pay to the order of F. H. Winston, Seven Thousand Three Hundred and Thirty-Three Dollars, payable at the Cook County National Bank, in Chicago. Value received. Due Nov. 12th, 1872.

JAMES N. BURNES.

(And endorsed on the back as follows):

Pay to the order of George W. DeCamp, without recourse to me.

F. H. WINSTON.

GEORGE W. DECAMP.

The note was endorsed as above, by George W. DeCamp, to Milton Courtright, to whom Winston sold it in payment of said Winston's indebtedness to him. That this is the true history of the transfer of the note by Winston, is shown by Winston's testimony in this case, on file in this Court, commencing on page 766 in answer to the question. "Why did you transfer this note to Mr. Courtright?" Because I was satisfied it was due him, and he made an application for it in settlement of various transactions between us.

On the same page of said testimony following, he answers as follows:

TO THE QUESTION — State, Col. Winston, if you, prior to the transfer of this note to Mr. DeCamp for Mr. Courtright, paid over to him all of the money and property in your hands, or that came into your possession, growing out of his (Courtright's) contract for the construction of the Chicago and Southwestern Railway.

To which he answers as follows:

I had; yes, sir, with the exception of what was settled at that time.

On page 614, of his testimony, on cross-examination by the Plaintiff in Error in this case, Col. Winston says as follows:

The bonds were figured at sixty cents on the dollar, and my interest was estimated, I think, at two-fifths. I cannot

recollect now—at any rate that was agreed upon as the amount of my interest on the bonds. That is the amount of the note. I expected that Col. Burnes would go on and sell the bonds, and pay the amount of the note. I want to say further, that I had not then investigated as fully as I have since the state of accounts between the various parties, and thought it might be possible that the transfer of these bonds might not be an act of so great injustice to myself as I have since thought it was. I have no desire, however, to repudiate the arrangement, as I believe the transfer was made in good faith on the part of myself and Mr. Courtright's attorney, who knew, perhaps, less about the accounts than I did.

On page 599, of his said testimony, he says as follows:

In answer to the question, which question is as follows:

Q. Will you state, Mr. Winston, if at the time you settled with Mr. DeCamp, as the attorney in fact for Mr. Courtright, and turned over to him for Mr. Courtright, the note of $7,333—I mean the same note you have referred to in your former deposition—whether or not that note was a *bona fide* note given to you by Mr. Burnes for value, and if you transferred that note to Mr. Courtright in settlement of the matters between you and him.

A. I then believed, and now believe, it was, and I did so transfer it.

Now, the Court will perceive from the foregoing testimony of Col. Winston, the true history of the manner in which this note was given and transferred to the Defendant in Error, Milton Courtright.

Now the Plaintiff in Error, in his brief of argument on page 20, says, through his counsel, that "this suit is for the "collection of a claim procured without consideration by a "threat of blackmail and the promise not to sue on it, by "the attorney who prosecutes it under a champertons "contract."

Now the history or facts in this case, as to the want of consideration, must be deduced from the foregoing testimony of Col. Winston, for there was not, nor could there be, any one who knew the facts better than Col. Winston, who transferred the note.

The further statement above referred to, and quoted from Plaintiff in Error's brief of argument, is untrue in every particular; that the note was obtained with a promise not to sue on it, is without one particle of evidence to sustain it, as will be shown by the testimony of Col. Winston on page 617.

The understanding was in writing, and will show for itself. The only understanding I had with Mr. DeCamp about it was that it should not be sued until the demurer pending in the suit which I had here with the bond-holders of the Branch should be disposed of. The writing is as follows:

CHICAGO, ILL., October 24, 1877.

DEAR SIR:

I am greatly pleased at the amicable arrangement and settlement of the matters between yourself and Mr. Courtright. In your litigation now pending with Vow Weil, I am fully satisfied that you are in the right, and will and ought to defeat his pretended claim. My client, Mr. Courtright, who is cognizant of all the facts in the case, expressed the same opinion, to wit:

That Von Weil has no just claim against you, I will be pleased to render you any aid in my power to defeat this, in my opinion unjust claim. The note of Burnes you this day delivered to me for Mr. Courtright, I will not sue upon until demurer is disposed of in your case with Von Weil. I suggest this for prudential motives.

With great respect, I am your obedient servant,

G. W. DECAMP.

COL. F. H. WINSTON.

Now, from the foregoing statement taken from the testimony of Col. Winston, in what light must this Court look upon the statements made by the plaintiff in error, in which he distinctly states in his brief that this note was not to be sued upon.

Now in relation to the history of the making of this note Mr. Winston, following on page 599 of his testimony, says:

In answer to the question, state, Mr. Winston, from the knowledge you now have or had at the time, or whether or not there was any agreement or understanding between you and Burnes other than that the note was a *bona fide* one, and

given to you without condition for your interests in those bonds, as stated by you in your former disposition.

A. The note was given to me for my interest in those bonds and was a *bona fide* note. At the time the note was given I told Col. Burnes that I should not expect him to pay it until he had a reasonable time to dispose of the Atchison bonds. I don't know whether the bonds have yet been disposed of or not by him.

It further appears in the history of this case that Burnes, commencing on page 1294, he testifies himself. He says: "In same form I collected the interest for four years on these bonds." And further, on page 1313 when asked what he did with the bonds, he answers: "I gave them to the parties to whom they belonged."

He also admits and testifies that he gave this note to Winston for the purpose of getting possession of the bonds. In fact the entire history in this case exhibits a simple purchase of bonds of the city of Atcheson, belonging to the payee of the note, F. H. Winston, by Burnes for which Burnes gave to Winston the note in suit. There was no complications of any kind—no partnership matter. It was a simple sale by Winston of his Atchison city bonds for Burnes' note and an understanding or statement by Winston to Burnes that although the note was payable in 30 days, yet Winston said to him that he would not ask him to pay until he had a reasonable time to sell the bonds.

The queer attempt of Burnes to set up that the note was merely a memorandum, is contradicted by every fact in the history of this case and on its face is preposterous.

Now upon this note the plaintiff brought suit by his attorneys Bottsford & Williams on the 18th day of November, A. D. 1878, and filed the following petition:

And the plaintiff for further cause of action states that on the 10th day of October, A. D. 1872, at the city of Chicago, Illinois, the defendant, by his promissory note of that date, herewith filed and marked exhibit "A," did promise to pay thirty days after date, to the order of F. H. Winston, Seven Thousand Three Hundred and Thirty-three ($7,333 00) dollars, payable at the Cook County National Bank in Chicago

value received, and then and there delivered said note to F. H. Winston, which said note said Winston afterwards endorsed and for a valuable consideration delivered to George W. DeCamp for the plaintiff, who then became the endorser and now is the holder and owner thereof, and that no part of said note has been paid to this plaintiff.

Wherefore this plaintiff prays judgment against said defendant for the sum of seven thousand three hundred and thirty-three ($7,333.00) dollars, the amount of said note with interest thereon since the 18 h day of November, 1872.

MILTON CARTRIGHT,
BOTTSFORD & WILLIAMS,
Attorneys for Plaintiff.

JEFFERSON CITY

To which petitions the defendant filed the following answer:

Defendant James W. Burnes, by his attorney, for amended answer to plaintiff's petition, says:

1st. He denies each and every allegation in said petition.

2d. For further answer to said petition says, that before and at the time of making of the pretended note in said petition described, said plaintiff, this defendant and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite city of Atchison, in Kansas, from a point on the Chicago and South Western Railroad, which road was known as the Atchison Branch of the Chicago and South Western Railroad. Prior to the date of said pretended note, said Winston had been in charge of the construction of said branch road for said partners under said contract, and had received and then had in his possession as part of the assets under such contract, forty bonds of the city of Atchison for the sum of one thousand dollars each belonging to said partners, subject to the payment of the partnership debts, and a distribution among said partners after such payment, in proportion to their respective interests therein.

Shortly before said pretended note was made said partners made, constituted and appointed the defendant as trustee for said partners, to take charge of said partnership business in

place of said Winston, and to wind up said business. That at the time of making said pretended note, said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership or in said bonds been ascertained. That, at the time of making said pretended note, said Winston turned over to this defendant, as trustee of said partners, as aforesaid, said bonds and other assets in his hands belonging to said partnership, with the consent of said partners and for the benefit of said partnership, and at the time said Winston turned over to defendant said bonds and assets, said Winston estimated that there would be due him, as a partner, as aforesaid, upon the final settlement of said partnership, a considerable sum of money owing from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note.

That, there having been no settlement of said business, said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due by said partnership and the result of said settlement, said Winston, therefore, requested this defendant, as the trustee of said partners, of whom plaintiff was one, to make said note with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account said bonds on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself as trustee of said partnership, and not as the separate note of this defendant.

Said pretended note, so executed, was assigned by said Winston for the benefit of plaintiff, to one G. W. DeCamp, and by said DeCamp to plaintiff, without any consideration from said DeCamp to Winston, nor from said plaintiff to DeCamp, and with full knowledge by said DeCamp and plaintiff of said facts relating to said note, and that such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said DeCamp and plaintiff and Winston that this defendant should not be sued upon said note.

And this defendant says that said note is wholly without

consideration and is null and void, and that said note is based upon, and grew out of, transactions relating to the business o said partners. That said partners are interested in the same, and are necessary parties to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership can be had

For further answer to said petition, said defendant says said plaintiff ought not to have or maintain his said action, because he says that said action was instituted, and is being prosecuted, under an agreement between plaintiff and George W. DeCamp, his attorney, by which said DeCamp agrees to prosecute such suit and to pay all the expenses incident to the prosecution of the same, in consideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit : Two-tenths of the amount so recovered, which said agreement is illegal, against public policy and good morals.

Defendant, therefore, asks to be discharged, with his cost.

HALL, STRONGFELLOW & WATERS,

For Defendant.

To this answer the plaintiff replies. And to each and every count thereof denies, each and every allegation thereof, and each and every count therefrom.

Now on this petition and the foregoing answer, this case was tried before Judge McCrary.

The parties stipulating to waive a jury.

The defendant then moved the court as follows:

See page 21 of this Record.

Now comes the defendant in the above entitled cause and moves the Court to dismiss the same, because it is patent, from the statement of the plaintiff in his deposition on file in this cause, that it was instituted and prosecuted under a champertous contract between plaintiff and George W. DeCamp, his attorney, under, and by virtue of which said defendant was to prosecute this suit and defray all the expenses thereof, and receive a part of the sum recovered therein, for his services as an attorney for plaintiff.

STRONGFELLOW, WATERS & WOODSON,

Solicitors for Defendant.

To this motion to dismiss the plaintiff answered as follows:

See page 22 of Record.

Now comes the plaintiff Milton Courtright, by G. W. DeCamp, of counsel for said Courtright, and in answer to the motion of the defendant filed in this cause the 17th day of May, 1881, to dismiss the said cause for the reason stated in said motion, and respectfully represents that the alleged facts set forth in said motion are not true.

1st. It is not true that the said plaintiff in this case had an agreement in writing or any agreement that the said George W. DeCamp should for a certain interest in said cause institute said suit and pay costs and expenses, or any costs or expenses, as set out in said motion for dismissal.

2d. It is not true as set out in said motion that the said plaintiff admits and testifies in his depositions that suit was instituted and is prosecuted under a contract between the plaintiff and his attorney, George W. DeCamp, under and in which it was expressly stipulated and agreed that the said attorney was to prosecute said suit, and for his services in bringing and prosecuting the same he was to have a certain part of whatever sum was or might be recovered therein, and in which it was further agreed and stipulated that said attorney was to pay all expenses and costs incurred in said suit.

3d. It is not true that said DeCamp instituted said suit, but the fact is that the attorneys who brought this suit, Bottsford & Williams, attorneys-at-law of this court, were employed by said plaintiff on his own behalf, and were and are to be paid for their services by the complainant himself and not by said DeCamp in whole or in part.

4th. The fact is that no other counsel were upon the record or responsible for the conduct of this case but said Bottsford & Williams until long after the case was at issue.

5th. That the said George W. DeCamp was not at the time of the institution of this suit an attorney-at-law of this court or of the State of Missouri until nearly two years after the institution of this suit.

6th. It is not true that the said George W. DeCamp made any illegal bargain or any bargain at all, or agreement either

in writing or otherwise, to institute this suit for the complainant or any other suit, or maintain any suit or suits for this complainant on the terms spoken of in said motion or any other terms, nor is it true that the said complainant so testified in the deposition referred to or any other deposition.

7th. And the complainant respectfully saith that the defendant has not verified his motion, and the facts in said motion stated by affidavit of his belief in their truth, and for this the said complainant ought not to be called on to answer said motion.

G. W. DECAMP,
of Counsel for Plaintiff.

We join in the foregoing answer.

BOTTSFORD & WILLIAMS,
Plaintiff's Attorneys.

Now the facts out of which the alleged illegal contract arises, are as follows: On the cross-examination of Mr. Courtright, on pages 150 and 151 of his testimony, he was asked the following questions:

Q. Is Mr. DeCamp your attorney?

A. Yes.

Q. Have you employed any other attorneys in this case?

A. I have not, except such as may have been employed by Mr. DeCamp for me.

Q. Did you employ Bottsford & Williams, of Missouri, as attorneys in this case?

A. I understand so from Mr. DeCamp that they have been employed for me.

Q. Who is to pay for their services?

A. *I suppose I shall have to pay them. I expect to pay them.*

Q. Is their fee contingent?

A. I don't know.

Q. Are the services of Mr. DeCamp to be paid in whole or in part on a contingency?

A. They are.

Q. Well, state the contingency.

A. I am to pay Mr. DeCamp some portion in proportion somewhat as to what I may receive from Burnes, and I calculate that that is to cover what has to be paid to the other parties.

On pages 532 and 533 of the printed testimony the following appears:

Interrogatory No. 129.

In your testimony formerly given in your own behalf in this case in answer to a question by Mr. Hall, attorney for the defendant, as follows:

"Are the services of Mr DeCamp to be in whole or in part on a contingency." You answered: "They are." In answer to the question as follows: "State the contingency." You answered: "I am to pay Mr. DeCamp some portion in proportion to what I receive, his fees to depend somewhat on what I collect from Mr. Burnes, but I calculate that will cover what has to be paid to other parties."

Q. State what was your contract with Mr. DeCamp for his prosecution of this suit against the defendant?

A. The first arrangement that I had with him was that I was to give him seven twenty-fourths of what I might realize out of it. That is my recollection of it. Subsequently, finding the case was likely to be a protracted one, involving a large amount of expense and labor to my attorney, I agreed to give him forty per cent., I think, of what he might, after the date of the last arrangement, collect of the net proceeds from Burnes. That is, what I would realize from Burnes after the date of this supplementary contract.

Q To what expense do you refer, in your answer, as likely to be incurred by your attorney as an inducement for increase of his fee.

A. Mr. DeCamp was to pay every expense incident to the prosecution of this suit to the final issue.

Q. When was the first contract made?

A. I do not recollect the date. but it was before the alleged settlement with Mr. Burnes.

Q. What was the date of the second contract?

A. It was not long since. I don't recollect the date. It was since the alleged settlement. It was since this suit was brought.

Q Were those contracts in writing, and have you those contracts, and will you file them as exhibits attached to this deposition?

A. They are in writing and I have them in my possession

questions at issue, and how they were presented and the verdict and judgment of the Circuit Judge upon the case that is sought to be reversed by the plaintiff in error.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

The argument of the plaintiff in error is so difficult to understand, so much involved in uncertainty as to what he intends to convey, that it is very difficult, as the court will see in reading his history of the case, his assignments of error, and in fact to arrive at just what he complains of, except his argument, or brief of argument, on page 20, that the action should have been dismissed because of the illegal and criminal conduct of the defendant in error, Courtright, making with his counsel a champertous contract, he complains that the case should have been dismissed. That the court in sustaining it would be made *particips criminis* in the commission of this great wrong.

In the foregoing history of this case we have stated accurately from the record of the testimony of Mr. Courtright, just what he says, and all he says in relation to this alleged iniquitous and champertous contract.

Now we submit to this court that the facts stated by Mr. Courtright will not sustain the learned Judge McCrary in finding that the contract with the counsel was champertous.

The court will see that Mr. Courtright distinctly states that he employed Bottsford & Williams to prosecute this suit and was to pay them himself or pay Mr. DeCamp, one of his attorneys, enough to pay them, or pay them directly himself.

He subsequently stated as the record will show that long after the institution of the suit, that in view of the great labor and expense that his attorney was put to that he would increase his compensation to forty per cent. He states distinctly that the arrangement he had with his counsel was in writing, and that he testifies in relation to it from recollection. To give his own language, he says: "I agreed to give him forty per cent. of what he might, after the date of the last arrangement, collect." Now we submit that the facts set forth

in the statement of this case, that under any view of it the contract of the defendant in error, Mr. Courtright, with his counsel was neither illegal nor immoral, nor had it a single element of illegality or immorality in it. Yet it may be said that under a strict interpretation of the law of maintainance and champerty the court would be justified in finding that it was so and that we would be bound by the statement made by Judge McCrary in his opinion that the contract with one of his counsel was champertous. The defendant below and the plaintiff in error moved the court to dismiss the case because of the champertous character of this contract. This was an independent motion made by the plaintiff in error, Burnes. See page 22 in this record. When this motion was made and the answer to it by the defendant in error and plaintiff below, wherein Mr. Courtright, by one of his counsel, answer this said motion, and it will be seen that the defendant abandoned his motion and rendered it substantially in his answer to the plaintiff's bill of complaint upon which this suit was tried.

In his answer to the plaintiff's bill of complaint on this illegal contract it will be fully set out in the history of this case. He does not set out the character of the offense. That is he does not name the offense, but he says for further answer to said petition, said defendant says:

"Plaintiff ought not to have or maintain his said action, because he says that said action was instituted and is being prosecuted under an agreement between plaintiff and George W. DeCamp, his attorney, by which said DeCamp agrees to prosecute such suit and to pay all the expenses incident to the prosecution of the same in consideration that said DeCamp shall receive a portion of the amount to be recovered in such suit, to wit: Four-tenths of the amount so recovered, which said agreement is illegal and against public policy and good morals."

Now we submit that from the answer of the defendant, in relation to the illegal contract set out in the foregoing answer the Circuit Judge was not warranted in declaring that the contract was champertous.

The answer it is true declares that the contract was illegal, but it does not claim that it was champertous.

The defendant in error, Courtright, had a right to be informed by the plaintiff in error's plea in answer, the exact character of the offense he had committed. Many contracts might be illegal between counsel and client and still not amount to maintainance or champerty.

We think the universal doctrine is that the character of an offense charged should state the name of the offense specifically, especially when it is asked as in this case, that the plaintiff should be driven out of court and refused the power of the court to collect an honest debt, or even to show that he has one. The offense to which such a hard rule would be inflicted upon a party should be set out specifically and proved beyond a reasonable doubt.

We think the learned Judge was correct in his opinion, in which he says, after refusing to dismiss the case: "If on the other hand, the defendant in an action has a valid or binding contract may avoid liability or prevent a recovery by money, a champertous agreement for the protection of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such a case is no party to the champerty, he is not intrusted in it, is in any wise injured by it.

If the contract upon which he is sued is a *bona fide* contract upon which a sum of money is due from him to the plaintiff, and if he has no defense upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fees and expenses of the suit.

The learned Circuit Judge says, after quoting the authorities that would tend to support the claim of the plaintiff in error, see page 24 of this record: Other courts have held that the fact that there is an alleged and champertous contract for the prosecution of a cause or action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. He cites Hilton vs. Woerts, L. R. 4, Eq.

Case 432. Edwards vs. Ayers, L. R. 10, Eq. Case 367. Whitney vs. Kortland, 27 N. J,. Eq. 333. Robinson vs. Beale, 26 Ga 17. Allison vs. R. Co., 42 Down 274. Small vs. R. Co., 8 N. W. Rep. 67.

On the general doctrine that a contract to receive a compensation for servites out of the matter, or from the matter in suit, see A. L. T. R., volume 4, page 21.

This was a case decided in the Circuit Court of the United States for the Southern District of Mississippi. The learned Circuit Judge says: "The common law on the subject of champerty and maintenance has not been generally adopted in this county, the reasons on which the law is grounded not existing here.

Therefore a contract such as that mentioned in the first head-note made by a party with his counsel is not an unlawful, but is a valid and binding contract.

See also Stanton vs. Haskon et al., 1st McArthurs' Rep., 558.

This case shows that the common law principle of champerty, as relaxed by modern decisions, is in force in the District of Columbia.

But that an agreement between attorney and client fairly made for contingent fees will be sustained both in law and in equity.

In 91 Otto, Page 252, when the question of Champerty was raised, the facts in this case showed that Tebbetts, the plaintiff below an attorney-at-law, was employed by Wright to present and prosecute his claim for one-tenth of what he might recover.

By the strictness of the common law this court, Chief Justice Waite delivering the opinion, decided that the contract was binding and valid, even between the counsel and client. He uses this explicit language: "There is nothing illegal, immoral or against public policy in a professional engagement to present and prosecute claim before such tribunal."

But it is argued that the evidence of Mr. Courtright showed that his counsel was to pay all the expenses incident to the suit, and that that changes it from a meritorious to an illegal contract. The court will see on looking at the testimony of

Mr. Courtright that his first agreement was simply one for a contingent for pure and simple.

That the subsequent modifications or second agreement, as he understood it, would cover all the expenses. Costs are not not mentioned by him nor is it by Judge McCrary.

I think I am safe in saying that the universal rule in this county between lawyers and clients for the collection of commercial paper like the note in suit, is that the note is given to the lawyer to collect, that he advances the necessary expenses attending its collection and is reimbursed out of the money he so collects, either by a positive or implied agreement with his clients, it will not fail to strike the court, if the matter complained of comes before the court on the testimony given by one of the parties on a cross-examination, when no such question has been propounded to the witness in the direct examination nor no such subject in controversy, the great injustice that would be done to the attorney who had a legitimate, unimpeachable contract for a contingent fee. The testimony in this case shows that the contract was in writing, that it was not produced, nor was its contents proven, nor could it be properly called for on a cross-examination when no such controversy existed or evidence of any kind touching the subject matter. We submit that the matter was not legitimately before the court, and that as no special verdict or facts were found by the learned Judge, nor was he required to find any special verdict, that his view of what the evidence established, given in his opinion, is not sufficient to reverse his judgment, though he may have erred.

We think that his refusal to dismiss the case or rather to regard it as a matter of defense to suit on a promissory note, was correct and will by this court, both on reason and authority, be sustained.

What there is left of this case he complains that the learned Judge ruled out or rather received this evidence tending to show that the note was without consideration, by proving that on the settlement of a partnership account between the plaintiff in this case, the defendant, Winston and Campbell it would or might be found that Winston had more money out of the partnership than he was entitled to. Now

the learned Judge received this testimony, and, after careful consideration held that it was incompetent to sustain the defense in a court of law, but the learned Circuit Judge says if this testimony had been regarded by him it would have made no difference. And in his opinion uses the following language (see page 35 of this record).

The note is in the usual form of a negotiable promissory note.

The alleged understanding and agreement relied upon by defendant is not in writing and the proof of it so far as there is any proof is in the parole testimony of the defendant. The testimony of Winston, the other party to the note, is directly in conflict with that of the defendant, and if it unnecessary to decide the question of fact, I should feel bound to say that Winston's statements corroborated and confirmed as they are by the writing itself made at the very time of the contract and presumably embodying the understanding of the parties, would prevail over the testimony of the defendant.

Now the court will see that on the facts of this case submitted to the court under the act of Congress he found a verdict for the plaintiff below and this defendant in error.

Now can this court go behind and beyond this verdict It will not be pretended that in absence of a special verdict, that in the opinion of the court stating what evidence he regarded as sufficient and upon which he found his verdict could or ought so be set aside on a writ of error. The law is well settled that if a jury, to whom facts are submitted, competent to sustain a verdict sufficient to warrant it, would disregard the verdict and set it aside because it thought other evidence incompetent and disregarded it, stating distinctly that if it had been received and held to be competent it would not have changed the verdict for the other evidence would prevail and was the truth and was sufficient to sustain the verdict.

What does this learned Judge say in effect The allegation of Burnes that this was not a promissory note, that it was not given for value is not true. The evidence of Winston, the note itself I believe to be true, and upon it I would find a verdict. He did find it and entered judgment upon it.

Was he warranted in doing that? Look at the testimony given by Winston in which he distinctly states.

I refer to his testimony on page 614 on file in this court and quoted by me in the history of this case which is as follows:

"The bonds were figured at sixty cents on the dollar, and my interest was estimated, I think, at two-fifths. I cannot recollect now, *at any rate that was agreed upon as the amount of my interest in the bonds.* That is the amount of the note. I expected that Colonel Burnes would go on and sell the bonds and pay the amount of the note."

On page 599 of Winston's teetimony in answer to the question propounded to him, as follows:

"State, Mr. Winston, from the knowledge you now have or had at the time, whether or not there was any agreement or understanding between you and Burnes other than that note was a *bona fide* one given to you without condition for your interest in these bonds as stated by you in your former deposition."

He answers clearly and distinctly: "The note was given to me for my interest in those bonds and was a *bona fide* note. At the time the note was given I told Col. Burnes that I should not expect him to pay it until he had a reasonable time to dispose of the Atchison bonds.

He states further on the same page: "I know of no accounts between us, and as I have lately been advised from statements made by Col. Burnes, I cannot see how any account could be stated against me.

Now if the court please, who is stating the truth about this note, and for what it was given and what was the understanding?

Is that favorite expression of his true, that it was merely an estimate, a memorandum, a pretended note? This kind of defense to his promissory note is an index to the character of his views of obligation. He himself admits in his testimony that he got the bonds, that he collected the interest upon them for four years.

On page 1294 of his own testimony he says: "I collected

the interest for four years." On page 1318 of his testimony he was asked: "What did you do with them." He answers:

"I gave them to the parties to whom they belonged."

Further along in his same testimony he testifies distinctly that he had to give the note to Winston to get the bonds, he got them, he kept them, he keeps them still, and yet he attempts to adroitly repudiate his own promissory note, given for the consideration of those bonds, that he took at sixty cents on the dollar. It was not the estimated value but it was the estimate of the bonds at sixty cents on the dollar. Can there be any doubt on the record face of this case, that the defense of the want of consideration is an adroit attempt on the part of the defendant Burnes, a flimsy pretext, wanting every element of sincerity and truth. That was the conclusion of the learned Judge below who tried the cause. Was he warranted in finding a verdict and entering judgment for the plaintiff.

Let us see what his own views of it were. He presented a bill in equity to Justice Miller, of this court, that he had no adequate remedy at law, that he could only defend in a court of equity.

The learned Judge prevented a trial at law from the statements in his bill in equity, he alleging in that bill in substance precisely what he set up as a defense to this action in his answer. He claimed in that bill that one Aller and George C. Campbell were interested in the note or the funds. The learned Judge, I quote from his opinion, from the brief of argument of the plaintiff in error. After Judge Miller quotes the provisions of the bill. See pages 24 and 25. Judge Miller says: "To put all these doubtful questions of account between these parties, one of them having a two-fifth interest, and another a one-fifth interest for the West Leavenworth Co., for Mr. Burnes says he had one-fifth interest in trust for this company, when there was two-fifths held by Burnes and probably by Aller and Campbell and Winston. To put all that to a jury in that confused way is not the way to settle these things." Further along on the same page Justice Miller says: "At my suggestion yesterday Mr. Winston, who had been put in and then stricken out, was con-

tinued as a party. The bill goes on to say that in some way Mr. Aller and Campbell were interested in the partnership. If they have parted with their interest it ought to be stated and if they have an interest in the settlement it should be stated, for there must be a settlement of the contract to ascertain whether Mr. Burnes ought to pay anything on that note."

Now the court will readily see another characteristic of this defense from the statement of the bill so doubtful that the learned Judge suggested its improvement. Yet he prevailed in keeping this case away from a trial before Judge Miller. As soon as this was accomplished he discontinued his bill. Burnes knew for he had taken the testimony of Campbell and it was on file at that very time, in which Campbell distinctly swears that he had no interest in the Atchison contract, that he was promised an interest but never got any.

I quote his testimony on this subject fully for without giving the testimony it would be impossible for this court or any court to understand the character of this defense. On pages 1133 and 1134 Campbell testifies as follows:

Now Burnes was not ignorant or taken by surprise when he filed his bill in order to avoid a trial, for, on the 23d day of November, 1880, when this case came on for trial he made an affidavit for a continuance and set out as follows:

James W. Burnes, the above named defendant, being sworn says:

See affidavit on continuance on page 11 of record.

That he cannot safely go into the trial of the above entitled cause at this term of court, because of the absence of George C. Campbell and Otis P. Glover, who are material witnessess for this defendant, and without whose testimony this defendant cannot safely go into trial of said cause That said witnesses both reside in the city of Chicago, in the State of Illinois. That said witnesses have not been subpœnaed nor their depositions taken in the above entitled cause, because this affiant did not know of the testimony of said witnesses, nor of either of them, until on the eighteenth day of this present month, and so since such information just came

to his knowledge, this affiant has not been able to procure the testimony of said witnesses, or of either of them.

This affiant says he believes he can, and expects to, prove by the testimony of said witnesses and of each of them, that the note sued on in this petition, in the above entitled cause, was without any consideration.

That at the time said note was given it was agreed between this affiant, the maker, and F. H. Winston, the payee of said note, that said note was given to, and to be held by, said Winston, as a mere memorandum of the share or interest of said Winston in certain bonds of the city of Atchison, then surrendered by said Winston to this affiant in trust and with other property on a like trust. That such bonds and other property had been held by said Winston as trustee for himself, this affiant, said Campbell and others." Further on in his said affidavit he says: "This affiant, said Winston, Campbell and others, were interested in the Atchison branch and these bonds."

Now was Henry M. Aller interested? On page 620 Frederick H. Winston testifies, in answer to the following questions, as follows:

"Was Henry M. Aller interested in the Atchison Branch?"

To which he answers as follows: "He was not."

Now it will require, I think, more ingenuity and ability than this plaintiff in error posseses (and whoever knows him knows it is great) to satisfy the court that his bill in equity or his several defences to this action to satisfy this or any other court that he is sincere or fair, or that any of his defenses are founded on fact except the one in which the defendant in error, Courtright, had committed the crime in relation to the contract he made with his counsel for compensation.

He swears in his affidavit above quoted, that he expected to prove his defence by George C. Campbell and Glover, to wit: That the note was given without consideration. He says he only learned this on the 18th day of November, 1880. Now how could this be true, if Campbell had testified already that he had no interest, how could it be true if Burnes knew

that Campbell was his partner. The explanation is plain. He imposed upon the court this bill in equity to get rid of a trial. He abandoned it when it had served its purpose, for he knew the facts whenever they came to the notice of the court would expose the iniquity in this matter. Indeed in every part of this defense by this plaintiff in error, he appears to presume on so mixing the facts that the hollowness of his defense will not appear. But it may be said that this court has nothing to do but to inspect this record and pass upon it, and look only to errors apparent on the face of the record. While this we admit to be true, yet no tribunal, however great, no Judges, however profound, can pass upon a case or decide it intelligently without looking at the facts

The plaintiff in error states in his brief of argument on page 20, this case, he says is a strong illustration of the wisdom of the rule, and says: This suit is for the collection of a claim procured without consideration by a threat of blackmail and the promise not to sue upon it by the attorney who prosecutes it under a champertous contract.

Now the effrontery of this statement made by this plaintiff in error through his counsel, is extraordinary in view of the testimony of Winston. See his testimony that the note was given to Mr. Courtright in settlement of matters between them, fairly given to him, that it was a *bona fide* note, that the settlement and the giver of the note on page 599 of Winston's testimony says the note was a *bona fide* note given to him by Burnes, that he transferred the note to Mr. Courtright, he says I then believed it was, and I did so transfer it. I have given the testimony of Winston in the history of this case, and in every line of it he testifies clearly to the *bona fide* absolute character of this note, and that he transferred it to Courtright in settlement of the matters between them. That that amount was due to Courtright, that the transaction was fairly made and in good faith between himself and Mr. DeCamp, the agent or attorney in fact of Mr. Courtright.

Now if this testimony is true, and I challenge the plaintiff in error to produce one particle of evidence to controvert it, from any quarter whatever, what must the court think of the

defense in this case when the defendant will, by his counsel, inject into a case matter that is absolutely untrue and without the color of evidence, true or false, to support it.

The plaintiff in error appears to think that making unfounded and injurious charges against the defendant in error and his counsel that this kind of thing would answer his obligations upon his promissory note or take the seals off his bond.

The only symptom of fact in these injurious charges are founded on this alleged illegal contract, made between the defendant in error in this case and his counsel in relation to his fees and compensation.

In relation to this charge we have only to say that there is scarcely a reputable lawyer in the land that has not taken a contingent fee, aided his client with means to bring his case fairly before the court, if his client was unable to do so. When this thing is due honestly and fairly in a meritorious case, we contend that it is not illegal and against good morals, but on the contrary is commendable when the purpose is fair and no wrong is contemplated or intended.

And now, if this verdict found by the learned District Judge is beyond the reach of any power to correct it, even though it was wrong, then what is their left in this case.

Did the court receive evidence that it should not have done under exceptions, or did it exclude legal and competent evidence that would and ought to have produced a different verdict. If it did, it will be found in the learned Judge's bill of exceptions.

The trial of this case was had, and took place, commencing on the 3d day of November, and concluded on the 4th day of November, 1881, and taken under advisement by the court which will appear on page 28 of this record. Thereupon the court had it under advisement until the 9th day of January, 1882, (see page 27 of this record) and on that day the defendant, by his attorney, files a motion for a new trial, and by consent has leave until next term to prepare bill of exceptions.

The bill of exceptions are as follows. See 28th page of record.

Be it remembered that on the trial of this cause the defendant offered in evidence a copy of the books of Milton Courtright and of the Atchison Branch of the Chicago & Southwestern R R Co., kept under the supervision of F. H. Winston as President of the C. & S. W. R. R. and trustee for the contractors of the Atchison Branch, and to read therefrom accounts showing the amount paid to said Winston and plaintiff on account of the construction of the Atchison Branch for the purpose of showing that at the date of the note sued on said Winston and plaintiff had been paid more than their share of the profits arising from said contract.

In connection therewith defendant introduced testimony showing that the original books were the books of Milton Courtright pertainnig to the construction of the C & S. W. R. R. Co and the trustee of Milton Courtright.

That the original of those books are in the possession of the Chicago R. I. & P. R. R. Co. at Chicago, successors of C. & S W. R R. That they were turned over to that company in 1872 by Winston, and that they are part of the records of that corporation.

To the introduction of the copies of said books plaintiff objected because no effort has been made to obtain the original books, and in their absence the best evidence would be the testimony of the bookkeeper who made the originals.

The court sustained the objections and refused to allow defendant to introduce the said copies of said books, and because they were irrelevant and immaterial.

The defendant then gave evidence tending to show that Winston, the payee and assignor of the note sued on, the plaintiff, defendant and one, Campbell, were the contractors for the construction of the Chicago and Southwestern Railroad as partners, and that Winston was entitled to an interest of (2-15) two-fifteenths in such contract.

That the road was constructed in 1871.

That Winston had charge of the execution of such contract and posession and control of the assets arising from such contract. That after the completion of said ro d in October, 1872, Winston delivered to defendant forty bonds of the city of Atchison for one thousand dollars each, which had

been received and were then held by him as part of the assets under such contract. That such bonds were delivered by Winston to and received by defendant as trustee for the parties in interest in such contract.

That at the time these bonds were so delivered defendant gave to Winston the note sued on.

Plaintiff gave evidence tending to contradict the foregoing evidence offered by defendant.

Defendant then offered Burnes as a witness and offered to show by his testimony that the note sued on when given was not intended by him, the maker, nor by Winston, the payee, as a promissory note, but was only intended and so given by him and received by Winston as a memorandum of the then estimate of the value of the estimated interest of Winston in the Atchison bonds then delivered as part of the profits of the aforesaid contract for the construction of the Atchison Branch to be accounted for on a settlement between the partners to such contract.

To the giving of such evidence plaintiff objected, as irrelevant and incompetent, and the court having received the evidence, subject to the objection on final consideration, the objections were sustained by the court and the evidence rejected.

To which opinion of the court, in excluding such evidence, defendant at the time excepted.

The plaintiffs gave evidence tending to contradict that of the defendant above stated. Defendant then gave evidence tending to show that the only consideration of the note sued on was the transfer by Winston to defendant of the interest of Winston in the Atchison bonds as part of the profits of the contract for the construction of the Atchison Branch.

Defendant thereupon offered evidence tending to show that upon a settlement of the partnership accounts between said Winston and his partners in the contract for the construction of said Atchison Branch, the said Winston would have had no interest in the profits of said contract, having received more than his share thereof prior to the giving of said note, which evidence was offered or tending to show that the consideration for such note had wholly failed.

To all of which evidence so offered plaintiff objected as in-

competent and irrelevant, and the court, having received the same subject to the objections, on final consideration, the objections were sustained by the court, and all of such evidence excluded.

To which opinion of the court in excluding such evidence defendant at the time excepted.

The plaintiff offered evidence tending to contradict that of defendant last above stated.

It appearing in evidence that this suit is prosecuted by George W. DeCamp, one of the attorneys for plaintiff, under an agreement, that said DeCamp shall pay all expenses incident to the prosecution, and shall receive for his services 40 per cent. of the net proceeds collected from defendant. The defendant moved the court on this account to dismiss this suit, but the court overruled the motion.

To which opinion of the court the defendant at the time excepted.

And thereupon afterwards on the 9th day of January, 1882, the court rendered judgment against the defendant for the sum of $11,401 61 and costs.

To which opinion of the court of rendering judgment against defendant, defendant at the time excepted.

And now asks that this bill of exceptions be signed, sealed and made a part of the record in this case.

GEO. W. McCRARY,
Circuit Judge.

Now the court will observe that this case was tried and held under advisement until the 9th day of January, 1882, at which time he found verdict and entered judgment upon it. He asks leave for time to prepare a bill of exceptions, to the next term (See page 27 of record.) On the 27th of May, 1882, the foregoing exceptions were certified by the court. (See page 28 of record for the exceptions.)

Now if the court please in regard to the evidence as set out in this bill of exceptions, was the court right in finally rejecting the evidence offered by the defendant as shown in this bill? Could he do otherwise than overrule the exceptions to the books? They were only copies.

The objection to them was in these words: To the introduction of the copies of said book the plaintiff objected because no effort has been made to obtain the original books, &c.

In their absence the best evidence would be the testimony of the book-keeper who made the originals.

The next evidence that he gave was in relation, as the court will see, to show that Winston, the payee, and assignor of the note sued on, the plaintiff, the defendant and Campbell were the contractors for the construction of the Chicago and Southwestern Railroad as partners.

I need not to quote the whole of this offer of evidence, it appears on page 29 of this record.

It will be readily seen that this offer referred to would have no tendency whatever to support his answer to the plaintiff's complaint.

The offer as made might and ought to have been excluded at once. It not only does not support his plea, but contradicts it. There is no allegation in his plea or defense suggesting anything touching the construction of the Chicago and Southwestern Railway. The evidence must have a tendency to support his plea or it must be rejected.

The next portion of his offer is to show by Burnes, the defendant, that the note was not intended to be a promissory note but a mere memorandum of the estimated value of Winston's interest in the Atchison bonds, then delivered as a part of the profits of the aforesaid contract for the construction of the Atchison Branch, to be accounted for and settled between the parties

Now the court will observe that this evidence that was finally rejected by the court as it stands has not a tendency to support the matter set up in his plea of defense.

The plea is so involved, so obscure that it is impossible to see how this evidence could have supported it. In one portion of his plea he declares that the note was given for an estimated value of Winston's interest in the Atchison city bonds. Now it is difficult to see how the note could be without consideration and void, and yet be given for an interest of Winston in these bonds. How it could be, in the language of said plea,

the share of said Winston on account of said bonds and settlement between said parties, is difficult to understand if the note is null and void.

Now the last matter on the merits of this case on which I suppose the plaintiff in error relies, is what I understand he calls his second or third plea found on page 24 of this record. It is as follows:

And this defendant says that said note was and is wholly without consideration and is null and void, and that said note is based upon and grew out of transactions relating to the business of said partners, that said partners are interested in the same, and are necessary parties to a suit relating to said note, and the amount due upon said note if any, cannot be ascertained until a final settlement of said partnership, can be had.

In this portion of his plea which as I take it embodies his entire defense on the merits, we are at a loss to understand how the evidence that was received by the court and finally excluded could have supported it.

He proposed to show by Burnes that upon a settlement of accounts between said Winston and his partners for the construction of the Atchison Branch that said Winston would have no interest in the profits of said contract having received more than his share thereof prior to the giving of said note.

Now this evidence, if it had been held to be competent, it does not show, nor has it a tendency to show his defense as set out in his pleas as the court will plainly see in reading his defense His plea alleges distinctly that said note was and is wholly without consideration and is null and void, and yet in the same plea he says that it was given on account of said partnership, and that the amount due upon said note, if any cannot be ascertained until a final settlement of said partnership cand be had.

He distinctly admits in this plea that it was based upon a good consideration, to wit: The value of Winston's interests in the partnership, and that the parties interested in the same are necessary parties to a suit relating to said note, and the amount due upon said note, if any, cannot be ascertained until a final settlement of said partnership can be had.

Now we submit that none of the evidence offered by him and rejected by the court, would support this plea or tend to support it as it stood. He offered no other evidence, he did not propose, nor did he follow it with any other evidence.

How a note could be null and void, and yet that the parties to a partnership would have to be made parties to a note, his individual promissory note and how they could be made such parties, is a very perplexing question.

How the amount due upon it would have to be ascertained by a final settlement of said partnership can be had is also quite as obscure and perplexing if it was null and void.

It is true that he injects into this plea that the note is wholly without consideration and null and void, thus is a proposition that I think will require no less ingenuity than this adroit plaintiff in error possesses No other mind that we have ever met do we believe competent to the task. There is no answer to it, except the answer he gets from the defendant in error's cross-examination of the compensation he was to allow, or give to one of his counsel for aiding him in collecting this note.

If a promissory note given for value received, bank paper is to be figured out of existence by such machinery we will await with curiosity the reasoning that leads to such a conclusion.

The truth is and stands out boldly and clearly notwithstanding the ingenuity of the plaintiff in error that the note in suit was given by Burnes to Winston for Atchison city bonds at about half their value without condition or qualification except that Winston voluntarily said to him (Burnes) that he should have a reasonable time to sell the bonds and pay the note. That the note was sold and delivered to Mr. Courtright in part consideration of a settlement between Courtright and Winston, without qualification as a *bona fide* note, and that the partnership matters if there were any had nothing whatever to do with it in any manner.

That to obscure this plain statement of facts upon which Judge McCrary found for the plaintiff below and defendant in error, that these defenses set up are fancied and unreal is too plain for argument.